85-827

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS W. STEVENS, LARRY WEISSMAN, RONALD LANDBERG, JEFF HUESTON,

PETITIONERS,

-v-

STATE OF CALIFORNIA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

THOMAS W. STEVENS
LARRY WEISSMAN
RONALD LANDBERG
JEFF HUESTON
1889 Oak Street
San Francisco, CA 94117
Telephone: (415) 386-9914

November 12, 1985

PETITIONERS PRO SE

QUESTIONS PRESENTED

1. Is the Federal right of a defendant to be informed of the nature and cause of the accusation against him violated by a state accusatory pleading which does not inform the defendant of what specific unlawful act the prosecution intends to prove at trial?

2. Both Federal and California authority forbid as violative of the Fourteenth Amendment selective prosecutions, and require trial courts to hear and assess evidence that a prosecution is selective, rather than even handed. If a motion to dismiss based on substantial evidence that the prosecution is selective is denied on the sole basis of conclusionary affidavits by prosecutors that the prosecution is not selective, does this violate Fourteenth Amendment protection?

3. Can an arrest by a police officer

be retroactively transformed into a citizen's arrest for the purpose of evading the exclusionary rule, and, even if so, should evidence seized by police officers in a search subsequent to a citizen's arrest be suppressed when the prosecution presents no evidence at all that the citizen had a right under the law to make the arrest?

4. Can the Sixth Amendment right of a defendant to have compulsory process for obtaining witnesses be supplanted by an offer from the prosecution to attempt to itself subpoena a crucial defense witness?

5. If a United States citizen is convicted in a state court by means of flagrant violations of state law, and these violations are ratified by state appellate review, does this create for purposes of certiorari by the United States Supreme Court an independent federal ground of denial of equal

protection of laws guaranteed by the Fourteenth Amendment?

LIST OF PARTIES

All of the parties are listed in the caption.

TABLE OF CONTENTS

Questions Presented..... i

List of parties.....iv

Table of authorities.....viii

Petition for Writ of Certiorari..... 1

Opinions below 2

Jurisdiction..... 2

Constitutional and statutory
provisions involved..... 4

Statement of case..... 5

Reasons for granting the petition...18

1. The Supreme Court should grant certiorari to determine whether accusatory pleadings should inform defendants of what specific unlawful act the prosecution intends to prove at trial.....18

2. The Supreme Court should grant certiorari to determine whether conclusionary affidavits by the prosecutor that

the prosecution is not selective is sufficient grounds for denial of a motion to dismiss based on substantial evidence that the prosecution is selective.....33

3. The Supreme Court should grant certiorari to determine whether a citizen's arrest can be used by police to evade the Fourth Amendment; and, if the state relies on a citizen's arrest, whether it must show that the citizen had a legal right to make the arrest.....39

4. The Supreme Court should grant certiorari to determine whether the Sixth Amendment right to compulsory process for obtaining witnesses in defendant's favor can be

transferred to the prosecution...46

5. The Supreme Court should grant certiorari to determine whether violations of state law by the state judiciary give rise to an independent Federal ground of denial of the equal protection clause of the Fourteenth Amendment.....49

Conclusion.....63

TABLE OF AUTHORITIES

United States Supreme Court cases:	PAGE
Coolidge v. New Hampshire (1971) 403 U.S. 443; reh. denied 404 U.S. 874	40
Hicks v. Oklahoma (1980) 447 U.S. 343	52,53
Oyler v. Boles (1961) 368 U.S. 448	34
Two Guys v. McGinley (1961) 366 U.S. 582	34
United States v. Hess (1888) 124 U.S. 483	19,20
United States v. Leon (1984) ___ U.S. ___; 104 S.Ct.3405	44
Williams v. United States (1950) 341 U.S. 97	42
Yick Wo v. Hopkins (1886) 118 U.S. 356	34
Federal cases:	
Choung v. People of State of California (ED Cal. 1970) 320 F. Supp. 625	19
United States v. Berrios (2d Cir. 1974) 501 F.2d 1207	34
United States v. Lima (DC App. 1980) 424 A.2d 113	42

United States v. Steele
(9th Cir. 1972) 461 F.2d 1148 34

California Supreme Court cases:

Murgia v. Municipal Court
(1975) 15 Cal.3d 286 34

People v. Ashley
(1954) 42 Cal.2d 246 58

People v. Haven
(1963) 59 Cal.2d 713 40

People v. Pierce
(1939) 14 Cal.2d 639 28

People v. Zelinski
(1979) 24 Cal.3d 357 42

California District Court cases:

Lamadrid v. Municipal Court
(1981) 118 C.A.3d 786 29

People v. Alexander
(1983) 140 C.A.3d 647 29

People v. Benjamin
(1975) 52 C.A.3d 63 47

People v. Manning
(1981) 120 C.A.3d 421 60

People v. Martin
(1964) 225 C.A.2d 91 43

People v. Terry
(1974) 38 C.A.3d 432 58

Constitutional provisions and Federal statutes:

Fourth Amendment	4, 43, 45
Sixth Amendment	4, 18, 19, 24, 33, 45, 48-9
Fourteenth Amendment	5, 19, 33, 50, 51,55
Title 28, U.S.C. Section 1257(3)	3

California Statutes and Rules:

Evidence Code Section 1103	46

Penal Code Sections:

236	6, 9
242	5, 9
415	6, 8
952	6, 8, 9, 39, 40
1093	60
1181	56
1182	56
12025	6, 8
12031	6, 8, 39,40

California Rules of Court:

Rule 63 3

Rule 107 3

San Francisco City Charter, Section 3.536 41

NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS W. STEVENS, LARRY WEISSMAN, RONALD LANDBERG, JEFF HUESTON,	)
PETITIONERS,	)
-v-	)
STATE OF CALIFORNIA,	)
RESPONDENT.	)

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DEPARTMENT OF THE SUPERIOR COURT, IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, STATE OF CALIFORNIA

Petitioners respectfully pray that a Writ of Certiorari issue to review the Judgment on Appeal of the Appellate Department of the Superior Court of the State of California, in and for the City and County of San Francisco, affirming

Judgments of Conviction made and entered in the Municipal Court of the City and County of San Francisco, State of California.

OPINIONS BELOW

The Judgment on Appeal and Memorandum of Opinion of the Appellate Department, Superior Court in and for the City and County of San Francisco, State of California, is unreported, and is printed in the Appendix hereto, at pages 1a to 138a. An Order In Re: Petition for Rehearing and Application for Certification to the Court of Appeals of the same Court is unreported and is printed in the Appendix, pp. 158a-159a.

JURISDICTION

The Judgment and Memorandum of Opinion of the Appellate Department of the Superior Court, in and for the City and County of San Francisco, State of California (Appendix, pp 1-138a; 155a-157a was entered on August 26, 1985. A timely petition for

rehearing to that court was denied by operation of law (California Rule of Court 107) on September 25, 1985. A timely application made to the Appellate Department for certification to the California Court of Appeal was denied by operation of law (California Rule of Court 63) on October 7, 1985.

Although the petition for rehearing and the application for certification were denied by operation of law on September 25, 1985 and October 7, 1985, respectively, the Appellate Department of the San Francisco Court issued an order denying the petition and application on October 29, 1985.

On October 7, 1985, the Appellate Department issued an Order Staying the Issuance of the Remittitur until November 12, 1985 to allow petitioners time to file this petition.

Petitioners invoke the jurisdiction of this Court under Title 28 Section 1257 (3) of the United States Code.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. The Sixtn Amendment to the United States Constitution provides:

> In all criminal prosecutions,the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

> obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

3. The Fourteenth Amendment to the United States Constitution, Section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Petitioners Thomas Stevens, Ronald Landberg, and Jeff Hueston were arrested on August 14, 1982 following an incident which occurred in front of their workplace. Each was charged with battery (California Penal Code section 242) and false imprisonment

(California Penal Code section 236). Petitioners Thomas Stevens, Larry Weissman, Ronald Landberg, and Jeff Hueston were arrested on August 26, 1982 at the same location, and each was charged with battery. In addition, Weissman was charged with carrying a concealed firearm (Penal Code section 12025(b)), carrying a loaded firearm in public illegally (California Penal Code section 12031), and fighting (California Penal Code section 415). All of the charges were misdemeanors. The complaints are included in the Appendix at pages 178a-186a.

Petitioners appeared pro se throughout the proceedings. The cases were consolidated and tried together in the interest of judicial economy. (Municipal Court case numbers were 536093, 536094, 536095, 538321, 538642, 538640, and 538638).

Petitioners are members of the White Panther Party.

On August 13, 1982, the White Panther Party began circulating a petition to recall the Mayor of San Francisco. Petitioner Larry Weissman was one of the two proponents of the recall. Petitioner Thomas Stevens was the spokesperson for the recall. The arrests in these actions occurred one day and thirteen days after the petition campaign commenced. Complaints were filed on August 26, September 7, and September 16, 1982.

On January 13, 1983, the White Panther Party submitted the recall petition, signed by nearly 35,000 San Franciscans, to the Registrar of Voters of San Francisco.

On January 25, 1983, petitioners' motion to dismiss this case on the grounds that the prosecutions were discriminatory and their motion to suppress evidence were heard. The motion to suppress was denied on January 25, 1983. The motion to dismiss was denied on February 23, 1983.

On February 10, 1983, the sufficiency of the recall petition was certified by the Registrar of Voters. The recall election was set for April 26, 1983.

Trial in this case was held in the San Francisco Municipal Court, Honorable Joseph A. Desmond presiding, commencing on June 13, 1983. Jury verdicts were returned on July 5, 1983 and July 6, 1983.

With regard to the August 14 charges, Stevens, Landberg, and Hueston were acquitted of battery and convicted of false imprisonment. With regard to the August 26 charges, Hueston was acquitted. Landberg, Stevens, and Weissman were convicted of battery. Weissman was acquitted on the California Penal Code section 12025 and 415 charges, and convicted of illegally carrying a loaded firearm in public (California Penal Code section 12031) (RTD 1247:17-1249:21; D 1256:1-1258:8).

Petitioners made motions in arrest of

judgment and for a new trial. Both were heard and denied on July 29, 1983 (RT D 1266 thru 1293).

Sentences were imposed on July 29, 1983. Stevens was sentenced to the maximum sentences of one year and six months in San Francisco County Jail, to be served consecutively (RT D 1303:28-1305:14). Weissman was sentenced to the maximum of six months on the Penal Code section 12031 conviction and six months on the Penal Code section 242 conviction, also to be served consecutively (RT D 1301:15-1303:13). Landberg was sentenced to one year in County Jail on the Penal Code section 236 conviction, with all but 270 days to be suspended, and to six months on the Penal Code section 242 conviction, suspended. Landberg's sentences are to be served concurrently (RT D 1298:33-1301:14). Hueston was sentenced to one year in County Jail with all but 90 days suspended (RT D 1296:18-1298:19).

Petitioners were released on bail pending appeal.

Petitioners appealed the convictions to the Appellate Department of the California Superior Court, City and County of San Francisco (Appeal Nos. CR 3308, 3309, 3310, 3311, 3312, and 3313). On August 26, 1985, the Appellate Department issued its Judgment and Memorandum of Opinion affirming the Judgments of Conviction (App. 1-138a; 155a)

Demurrers to the Complaint

On September 23, 1982, petitioners demurred to the complaints in the August 26 charges. On September 29, 1982, petitioners demurred to the complaints in the August 14 charges. Both demurrers were made on the grounds that the accusatory pleadings did not inform defendants of the nature and the cause of the violations against them (among other grounds). Both demurrers stated that the accusatory pleadings

> violate rights under the Sixth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment

(Notice and Demurrer of September 23, 1982, 1:27-2:1; Notice and Demurrer of September 29, 1982, 1:25-27).

Petitioners specifically raised the Sixth Amendment grounds both in the written Memoranda of Points and Authorities and in oral argument at the hearing.

The demurrers were heard by the San Francisco Municipal Court, Honorable Roy L. Wonder, on October 21, 1982. Judge Wonder overruled the demurrers (see Appendix, pg. 139a).

After the verdicts and before sentencing, petitioners again raised the Sixth Amendment issue in a motion in arrest of judgment. The motion was made on the ground that:

> the complaints violate defendants' right under the Sixth Amendment to the Uni-

> ted States Constitution as applied to the States by the Fourteenth Amendment

among other grounds (Motion in Arrest of Judgment, p. 2).

The motion was heard and denied on July 30, 1983 (RT D 1266:24-1269:25).

Petitioners raised this issue on appeal.

The Appellate Department in its Opinion stated that

> Appellants would like this Court to find that current law violates the 6th Amendment and to change the law to require more specificity in pleadings.

(Appendix, p.20a)

The Appellate Department found that the demurrers had been properly overruled.

The issue was also raised by petitioners in the petition for rehearing (Petition for Rehearing, 8:12-9:5). The petition for rehearing was denied by operation of law on September 25, 1985.

The Motion to Dismiss on the Grounds of Discriminatory Prosecution

Petitioners moved to dismiss the charges on the grounds that the prosecutions were selective on December 20, 1982. The motion was

> based on the Fourteenth Amendment of the United States Constitution and on the California Constitution, as interpreted by Murgia v. Municipal Court (1975) 15 Cal.3d 286.

(Notice and Motion to Dismiss for Discriminatory Prosecution, p.2)

Petitioners submitted considerable evidence proving that there was prosecutorial bias against them as members of the White Panther Party (Appendix, p. 199-219a).

The only evidence submitted by the prosecution was two affidavits, one by the District Attorney and one by the Deputy District Attorney in charge of trial attorneys in that office (Declaration of Arlo Smith, Declaration of Gerald R. Koelling;

Appendix, pp. 232a-243a). The affidavits stated that the prosecutions were not selective and that assault charges are brought against many citizens every year.

The Municipal Court, Honorable Ina L. Gyemant presiding, ruled on February 23, 1982:

> The Court finds that the district attorney's declaration under oath compels this court to the conclusion that defendants have not met their burden of proof.
> And the motion will be denied.

(RT A 175; Appendix, p. 152a)

Petitioners raised this issue on appeal (Appellants' Opening Brief, pp.36-40; Appellants' Reply Brief, 6-7). The Appellate Department ruled that the motion to dismiss had been properly denied (Appendix, p. 35a).

Petitioners raised this issue in the petition for rehearing (p. 11-12). The petition for rehearing was denied by operation of law on September 25, 1985.

The Motion to Suppress Evidence

The arrest of Larry Weissman on August 26, 1982 was made without warrant (RT A 97). Petitioners moved, on December 20, 1982, to suppress as evidence in the case a handgun which was seized from petitioner Weissman by an officer of the San Francisco Police Department. The motion was made

> on the grounds that the search and seizure were without warrant and were unreasonable.

The motion was

> based on the Fourth and Fourteenth Amendments to the United States Constitution, as interpreted by Mapp v. Ohio (1961) 376 U.S. 643...

among other grounds. (Notice of Motion and Motion to Suppress Evidence and for the Return of Property, p. 2.)

The San Francisco Municipal Court, Honorable Ina L. Gyemant presiding, denied the motion to suppress on January 25, 1983 (Appendix, p. 140a-144a).

Petitioners raised the denial of the

motion to suppress evidence on appeal (Appellants' Opening Brief, p. 33-35; Appellants' Reply Brief, p. 5-6). The Appellate Department upheld the denial of the suppression motion (App., p. 27a-28a). Petitioners raised the issue in the petition for rehearing (p. 9-10), which was denied by operation of law on September 25, 1985.

Interference with Petitioners' Right to Subpoena Witnesses in Their Favor

At trial, the defense, during cross-examination, asked prosecution witness Elbert Wiltz, the alleged victim of the August 14 incident, the address of his ex-spouse. Wiltz had been arrested in December 1980 for assaulting his wife with a firearm in violation of California Penal Code 245A (San Francisco Municipal Court Number 376677).

Objections to this question were sustained. (Appendix, p. 222a-225a.)

Petitioners raised the issue on appeal on the grounds that under California law petitioners had a right to discover the address (Appellants' Opening brief, 62-63; Appellants' Reply Brief, 10). The Appellate Department stated in its Opinion:

> Appellants wanted Realla's address for the purpose of subpoenaing her. Once the Court allowed Respondent to subpoena her and Respondent so offered, it was no longer necessary for Appellants to obtain her address.
>
> (Appendix, p. 89a)

Petitioners requested a rehearing on this issue on the grounds that:

> It would be a miscarriage of justice for a conviction to stand which was obtained by . . .(2) the trial court transferring the defendants' Sixth Amendment right to subpoena witnesses to the prosecutor.

(Petition for Rehearing, p. 30)

The petition for rehearing was denied by operation of law on September 25, 1985.

REASONS FOR GRANTING THE PETITION

1. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER ACCUSATORY PLEADINGS SHOULD INFORM DEFENDANTS OF WHAT SPECIFIC UNLAWFUL ACT THE PROSECUTION INTENDS TO PROVE AT TRIAL.

The Sixth Amendment to the United States Constitution guarantees that an accused be informed of the "nature and cause" of the accusation. Petitioners argue herein, and have argued on demurrers to the complaints and since, that the phrase "nature and cause" is not a mere redundancy, but rather that it guarantees two separate rights--one, to be informed of the nature of the accusation, and two, to be informed of the cause.

It is not sufficient to merely inform the accused of the statute he is alleged to have violated, and to tell him the time and place of the violation. The accused also has a Sixth Amendment right to know what alleged act violated the statute.

This Sixth Amendment right ought to be among those made applicable to the states by the Fourteenth Amendment.

> A fundamental principle of due process of law requires that the accused be informed in advance of trial of the specific charges which he must defend. [Cites omitted] While the states have wide latitude to develop their own criminal procedures, they must still afford the accused this basic Constitutional right. Garland v. Washington, 232 U.S. 642, 34 S.Ct. 456, 58 L.Ed. 772 (1914).
>
> Choung v. People of State of California (ED Cal. 1970) 320 F. Supp. 625, 628

In United States v. Hess (1888) 124 U.S. 483, a case involving a federal prosecution, this Court stated a fundamental principle which remains good law today:

> Undoubtedly the language of the statute may be used in the general description of the offence, but it must be accompanied with such a statement of facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which

> he is charged..."[W]here the offence is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter,'" but adding that "to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defence, and plead the judgment as a bar to any subsequent prosecution for the same offence. An indictment not so framed is defective, although it may follow the language of the statute."
>
> United States v. Hess, supra, 124 U.S. at 487-488, quoting United States v. Simmons, 96 U.S. 360 (emphasis added)

Petitioners argue that this is a general right applicable in all criminal prosecutions. However, where, as in this case, with respect to the false imprisonment charge, the accused is actually misled as

to the basis of the allegation, then there is a clear violation of the Sixth Amendment, even if the accusatory pleading is held to be adequate in form.

With respect to the false imprisonment charge in this case, defendants were led to believe by the accusatory pleadings (Appendix, p. 178-9a), the circumstances out of which the charges arose, the police report (App. p. 160-170a) and all other discovery, that the basis of the charge was the contention that the defendants had falsely imprisoned the prosecutorially-designated victim for several minutes prior to the arrival of police officers, who then took custody.

At trial, with no notice whatsoever to the defendants, a police officer testified that defendants refused to release the prosecutorially-designated victim for three minutes even after being ordered to do so by police officers:

Q [By Prosecutor]: Did you ever ask the defendants, specifically Mr. Landberg and Mr. Hueston, to let the black man up?
A [Officer Phillips]: Yes.
Q And was there a reply?
A There was a look of confusion on both their faces, looking at me and Mr. Stevens.
Q Then did they let them (sic) -- him, after you asked to let him go?
A After a few minutes they let him up, but that was after Mr. Stevens' direction.
Q And how many times did you have to ask Mr. Landberg and Hueston to let the black man up?
A Two to three times.
Q And that was over the course of a few minutes?
A Three minutes.

(RT D 183:23-184:9; Appendix, p. 226-229a)

This new allegation was a shock and surprise to defendants. If believed by the jury it would have invalidated all of the defenses prepared by defendants, since even if defendants had a right to restrain the alleged victim prior to the arrival of police officers, they certainly could not have had any right to restrain him in vio-

lation of the order of a police officer.

Defendants moved to strike the testimony of the officer regarding the new allegation. The motion was denied. (RT D 555:-21-561:9).

The officer testified on June 17, 1983. The incident that gave rise to the charges occurred on August 14, 1982. Ten months after the incident it was virtually impossible to, in mid-trial, secure independent witnesses to the incident who would have remembered whether defendants did or did not immediately release the alleged victim when told to do so. Had the defendants been notified in the accusatory pleading that they were to be charged with restraining the alleged victim even after being ordered to release him by police officers, then it would have been quite likely that unimpeachable eyewitness testimony countering that allegation could have been obtained. (Ironically, the alleged victim

himself did not recollect being restrained after officers ordered his release. Appendix, p. 230a.

It is generally recognized that it is difficult to persuade a jury that a police officer is swearing to a falsehood. The surprise testimony of the police officer in this case presented an insurmountable problem for petitioners that would not have been possible if the Sixth Amendment right to be informed of the nature and the cause of the accusation had been respected in the accusatory pleading.

Petitioners were in fact convicted of false imprisonment. Since the jury acquitted them of the charge of battery, it follows that the jury did not believe the testimony of the alleged victim. The false imprisonment convictions were therefore in all likelihood based on the testimony of the police officer regarding the alleged false imprisonment after officers ordered

the alleged victim released.

But petitioners urge this Court to also issue a writ of certiorari on the general question of whether an accusatory pleading which does not cite a specific act in violation of a statute violates the Sixth Amendment.

One danger of generalized and conclusionary accusatory pleadings is the possibility of shock and surprise at trial. A second danger is that defense preparations will be unnecessarily complicated by forcing the accused to guess at which of all possible alleged acts the prosecution will eventually rely on at trial, and to prepare a defense to each.

An even more salient danger is that once a conviction has resulted from a vague accusatory pleading, the court at sentencing has no certain way of determining precisely what the accused was convicted of. To use this case as an example, were the

defendants convicted of falsely imprisoning the alleged victim prior to the arrival of police officers--which would, from a sentencing perspective, be perhaps regarded as bad judgment--or were the defendants convicted of falsely imprisoning the alleged victim after the arrival of police officers--which may well be taken as a defiant and dangerously criminal act. There is no sure way to tell, short of asking the jury, which of course is impermissible on many grounds.

A similar problem exists with respect to the charge of battery arising out of the second incident, on August 26, 1982. The prosecution argued alternatively that the defendants either attacked the alleged victim unprovoked, or else that, if they were defending themselves, they used excessive force (RT D 329:13-339:3; D529: 20-530:5). But the accusatory pleading did not present two counts. Which act did the

jury actually convict defendants of? Should a sentencing court regard defendants as having committed the relatively atrocious act of battering a perfect stranger for no reason or the relatively more understandable act of getting carried away in what was originally a self-defense effort?

Particularly with respect to petitioner Stevens, the trial court imposed the maximum sentence provided by law and ran the two sentences consecutively, so it may be inferred that these troubling questions were resolved adversely to petitioner Stevens. But given the ambiguous accusatory pleadings, what guarantee is there that the acts for which petitioner was convicted by the jury are the same acts for which he was sentenced by the trial court?

The anticipated counter-argument will be that under the "modern simplified rules of pleading" it is permissible in California and many other states for the prosecu-

tion to charge "in the language of the statute". California Penal Code §952.

But modern simplified pleading would be reduced to absurdity if it were taken to mean that the accused now has only a right to be told how the statute reads. A pleading in the form

> ...said defendants did wilfully and unlawfully violate the personal liberty of Elbert Wiltz.

is plainly insufficient (Appendix, 179a). Yet that is all the defendants were informed of in the charges in this action, and that is all the accused are informed of in a great number of boilerplate accusatory pleadings in modern times.

In felony cases, the accused not only receives an accusatory pleading, but also obtains a preliminary hearing or grand jury transcript. This narrows down the basis of the charges. People v. Pierce (1939) 14 Cal.2d 639. But there is no such

protection in misdemeanor cases. Lamadrid v. Municipal Court (1981) 118 C.A.3d 786, 790-791.

In misdemeanor cases, the accused receives a police report, and perhaps some statements by prospective witnesses. But there is no requirement in California, as shown in this case, for the prosecution to divulge the content of an oral statement it has received from a prosecution witness (People v. Alexander (1983) 140 C.A.3d 647. And there is no requirement that police reports or other statements include all the testimony the police officers may eventually give. The accused can, unless the Sixth Amendment right to be informed of the nature and cause of the offense is respected, be left totally in the dark regarding the basis of the charge against him.

There is no provision for any bill of particulars. There is no provision for

interrogatories or depositions.

There is an enormous potential for abuse. In the present case, that potential was actualized.

Neither the California Supreme Court nor any other California court has so far passed on the constitutionality of California Penal Code § 952 as it applies to misdemeanors. Consequently, there is very little authority that bears on the precise question raised herein. For the most part, this is because prosecutors don't regularly abuse the latitude they are presently given in framing their accusatory pleadings. But the Bill of Rights requires more than that the government refrain in most cases from violating the rights of the accused. It requires clear, reliable safeguards against such violations that are universally applicable. That there are presently no such safeguards embodied in binding case law is evident from what

transpired in the present case.

Petitioners admit that clear authority that a defendant has a right to be informed of the nature and cause of the accusation would have a widespread impact on quotidian functions of local prosecutors. The present method of glancing at a police report, thoroughly gauging the type of violations asserted therein, ascertaining the number of the appropriate statute, and treating preparation of the accusatory pleading as merely a clerical matter from that point on would be proscribed.

Prior to filing accusatory pleadings, prosecutors would have to scrutinize the case with the disciplined and analytic skills needed to prepare a complaint in a civil action. Very likely, many accusatory pleadings would never be filed, saving crucial time of the courts, the defendants and their counsel, and of the prosecutors themselves.

However, no legitimate law enforcement function would be impeded. No otherwise guilty person would escape prosecution as a result of a requirement that the specific provable act alleged to have been committed must be stated in the accusatory pleading.

Sometimes, of course, there would be some detail or other which would be in the accusatory pleading but would turn out not to be the case at trial. It is well-settled, however, that an immaterial variance between the pleading and the proof is not grounds for reversal. So prosecutors would experience no difficulty in this respect.

Retroactivity is also an issue which this Court would have to confront should it decide the present issue in favor of petitioners. As things now stand however few accusatory pleadings are demurred to, and a failure to demur waives the defect of vagueness in the pleading. Consequently, retroactivity would not upset an unduly

large number of convictions.

In summary, a stricter interpretation of the nature and cause provision of the Sixth Amendment would prevent the serious abuse which has arisen in the present case, would contribute to the efficency and effectiveness of the criminal justice system, and would not impede any aspect of law enforcement.

2. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER CONCLUSIONARY AFFIDAVITS BY THE PROSECUTOR THAT THE PROSECUTION IS NOT SELECTIVE IS SUFFICIENT GROUNDS FOR DENIAL OF A MOTION TO DISMISS BASED ON SUBSTANTIAL EVIDENCE THAT THE PROSECUTION IS SELECTIVE.

This Court has long held that the equal protection clause of the Fourteenth Amendment is violated if a criminal prosecution is deliberately based on an unjust-

ifiable standard such as race or some other arbitrary classification. Oyler v. Boles (1961) 368 U.S. 448; Two Guys v. McGinley (1961) 366 U.S. 582; Yick Wo v. Hopkins (1886) 118 U.S. 356; see also United States v. Steele (9th Cir. 1972) 461 F.2d 1148; United States v. Berrios (2d Cir. 1974) 501 F.2d 1207.

This holding was transmuted into binding California authority in Murgia v. Municipal Court (1975) 15 Cal.3d 286:

> Neither the federal nor state Constitution countenances the singling out of an invidiously selected class for special prosecutorial treatment, whether that class consists of black or white, Jew or Catholic, Irishman or Japanese, United Farmworker or Teamster. If an individual can show that he would not have been prosecuted except for such invidious discrimination against him, a basic constitutional principle has been violated, and such a prosecution must collapse upon the sands of prejudice.
>
> Murgia v. Municipal Court, supra, 15 Cal.3d at 290

In this case, petitioners presented considerable evidence that there was a prosecutorial bias against them as members of the White Panther Party (Appendix, 199a-219a).

Petitioners also argued that but for this bias, there would have been no prosecution. This second argument was based primarily on the fact that in both instances police officers came upon a scene that indicated mutual combat (in fact, in both instances petitioners were doing no more than restraining a previously violent assailant). Even from the perspective of the police reports, mutual combat was indicated (App., p. 165-169a, 176a). Yet in both instances, members of the White Panther Party were arrested and prosecuted, while those who had, according to the White Panther Party members, assaulted them, were neither arrested nor prosecuted.

Since both incidents took place with-

in two weeks after the White Panther Party members began circulating a petition to recall the Mayor of San Francisco, and since the prosecution took place during the petition campaign and after the petition had been qualified for the ballot, there was a strong showing that the prosecution may well have been selective. The recall campaign was a nationally disputed and bitter one which focused considerable government antagonism against the White Panther Party, which was recognized to be its organizers.

Above and beyond the fact of the recall campaign, petitioners presented evidence of prior prosecutions against White Panther Party members, nearly all of which involved situations where individuals came to places associated with the White Panther Party and, when fights ensued, claimed to be the victims of violent attacks by the Panthers. In all of these

instances, no Panther ever actually injured any alleged victim, but there invariably were charges that the Panther tried to inflict injuries. The general pattern would make the Panthers out to be the most incompetent assailants in history.

Still further, evidence which demonstrated various reasons for a prosecutorial animus against White Panther Party members was also presented. (See App., p. 199-219a)

To counter this, the District Attorney's office simply submitted two affidavits stating that the prosecutions were not selective, and that assault charges are brought against many citizens each year (Appendix, 232a-243a).

The trial court held that this alone compelled a finding that "defendants have not met their burden of proof." (Appendix, 152a)

Petitioners contend that where there is a substantial showing of selectivity in

a prosecution, the prosecution must at a minimum come forward with some explanation for why the defendants are prosecuted. This is particularly true when there is at least as much reason to believe that the prosecutorially-designated victims assaulted the prosecutorially-designated defendants, as the other way around. And it is even more particularly true when the defendants were, at the time of the incidents that gave rise to the charges and at the time of the prosecution, involved in a bitter political campaign against powerful local government interests.

Federal authority indicates that these circumstances require more than an affidavit from the prosecutor denying selectivity.

However, the prevailing Federal authority, while it certainly implies that a mere affidavit is not sufficient, does not actually state that more is required, thus leaving considerable room for abuse of

discretion by local judges perhaps gripped by an animus similar to that which inspires the prosecution.

Clear, more specific Federal authority is urgently needed, and the present case entails facts which may well make it a proper case in which to formulate clearer authority.

3. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A CITIZEN'S ARREST CAN BE USED BY POLICE TO EVADE THE FOURTH AMENDMENT; AND, IF THE STATE RELIES ON A CITIZEN'S ARREST, WHETHER IT MUST SHOW THAT THE CITIZEN HAD A LEGAL RIGHT TO MAKE THE ARREST.

Petitioner Weissman was convicted of carrying a loaded firearm in a public place (Cal. Penal Code §12031). There was no allegation or claim by anyone that he used the firearm. One police officer testified that the weapon was concealed (RT D 483:17-484:4; 486:7-11; 512:3-513:16), but

the jury acquitted Weissman of that charge (RT D 1256:14-23). In California a citizen can lawfully carry a loaded firearm in a public place when he

> reasonably believes that the person or property of himself or another is in immediate danger and that the carrying of such weapon is necessary for the preservation of such person or property.

California Penal Code Section 12031(j).

Petitioner Weissman asserted, at a motion to suppress, his state and Federal right to exclude evidence seized as a result of an unlawful search. Since there was no warrant, the prosecution had the burden of showing that the search was lawful. (Coolidge v. New Hampshire (1971) 403 U.S. 443, 454; People v. Haven (1963) 59 Cal.2d 713,717.) The prosecution produced one witness, a police officer who testified that he conducted the search pursuant to a citizen's arrest made by the alleged victim of the August 26 incident, Troy Chris-

tensen (Appendix, 197a).

Christensen did not testify at the suppression motion (App., 139a). There was no evidence introduced other than pure hearsay which indicated Weissman had done anything unlawful prior to being arrested, or even that he had done anything that could have been regarded as suspicious for the purpose of probable cause. The police officer who testified admitted that he did not see any of the alleged actions for which Weissman was arrested (Appen., 192a).

In fact, Weissman had been arrested and held at gunpoint by a "patrol special officer"[1], Ernest Radley. (Appendix, 193-4a) Such officers are held to be "state

1. The San Francisco City Charter provides for "patrol special officers" in Section 3.536. "Patrol special officers" are a special category of police officer employed by private parties but regulated by and exercising power pursuant to contract with the San Francisco Police Commission.

agents" for the purpose of the Fourth Amendment. Williams v. United States (1950) 341 U.S. 97; United States v. Lima (DC App. 1980) 424 A2d 113; People v. Zelinski (1979) 24 Cal.3d 357.

There was a conflict of testimony at trial as to whether Weissman was holding the alleged victim on the ground when he was arrested by the patrol special officer or whether he was standing on the stairs of a house. For purposes of appellate review of errors at trial, the former version must be accepted by the Court since it is the version most favorable to the prosecution. But for the purposes of review of the denial of the suppression motion there was no evidence submitted by the prosecution on this issue, and therefore this Court is not bound by any factual finding. The police officer who testified at the suppression hearing stated that he arrived at the scene while Weissman and others

were being held at gunpoint by the patrol special officer and saw nothing criminal prior to carrying out the search (Appendix, p. 192a-193a).

The prosecution took the position that it didn't make any difference what Weissman was doing when he was arrested, since in cases where a citizen signs a citizen's arrest card, all subsequent searches and seizures are automatically permissible and the Fourth Amendment affords no protection whatsoever.

Petitioners seek certiorari on the question of whether an arrest by a police officer can be retroactively transformed into a citizen's arrest in order to evade the Fourth Amendment, and secondly, whether, if the state relies on a citizen's arrest, the prosecution needs to show that there was probable cause for the citizen to make the arrest. People v Martin (1964) 225 C.A.2d 91.

Petitioners point out that the good-faith exception to the exclusionary rule enunciated in U.S. v. Leon (1984) __U.S.__; 104 S.Ct. 3405 (No. 82-1771) is not applicable here. If the arresting officer had believed he was acting in good faith, he would not have needed to transfer the responsibility for the arrest to a citizen who, whatever he did prior to the arrival of police, did not at any point place Weissman under arrest. (RT D 476:17-485:1; 488:18-492:8; D 329:27-339:28; 341:26-343:26)

In fact, it was admitted by the prosecution that the patrol special officer was holding five persons associated with the White Panther Party at gunpoint (App., 192a-193a), four of whom had at the very most committed a misdemeanor out of the presence of the patrol special officer. The fifth person, Weissman, was belatedly claimed to have been seen by the patrol special officer "on top of one person, hitting, striking, in a battle" (RT D 424:4-5).

If this claim were true, then the patrol special officer could have taken responsibility for the arrest, and the issue of probable cause would have turned on the credibility of his claim. But the prosecution chose to avoid this path.

Thus, although a search and seizure was conducted without a warrant by a police officer, and even though the prosecution did not produce a scintilla of evidence at the suppression hearing that the victimized citizen had done anything unlawful prior to the search, the evidence seized was admitted against him at trial.

It could not have been the intent of the Framers of the Constitution and its Bill of Rights that citizens would eventually come to be so easily deprived of the protection of the Fourth Amendment.

4. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER THE SIXTH AMENDMENT RIGHT TO COMPULSORY PROCESS

FOR OBTAINING WITNESSES IN DEFENDANT'S FAVOR CAN BE TRANSFERRED TO THE PROSECUTION.

The independent Federal grounds on which this question relies did not arise until the Opinion of the Appellate Department was issued.

Until that point the issue was the relatively routine one of whether an objection to a relevant question had been improperly sustained by the trial court.

The defense asked of a prosecution witness, Elbert Wiltz, the alleged victim of the August 14 incident, the address of his ex-spouse. Wiltz had been arrested three years before the trial for assaulting his wife with a deadly weapon, namely a firearm. The arrest was not admissible, but the character testimony of a person who was familiar with his violent character would have been admissible, and very valuable to the defense. (California Evidence Code Section 1103.)

The witness and the prosecution announced in front of the jury that if defendants were given the witness's ex-wife's address, she would be in danger from defendants (App., p. 223-225a). The jury did not know about the arrest of Wiltz on the complaint of his ex-spouse, so the irony of the prosecution's claim was clear only to the court, the defendants, and the prosecution itself.

The judge sustained the objection, leaving the jury with the unmistakable impression that the trial court itself believed the defendants would be likely to injure any person related to a prosecution witness whose address they may have learned. This denial, with no showing by the prosecution of harm to the witness, is directly contrary to California law. People v. Benjamin (1975) 52 C.A.3d 63,73.

The Appellate Department agreed that there was no showing of danger to the wit-

ness. However, it opined:

> Appellants wanted Realla's address for the purpose of subpoenaing her. Once the Court allowed Respondent to subpoena her and Respondent so offered, it was no longer necessary for Appellants to obtain her address.

Appendix, p. 89a, emphasis added.

This ruling plainly violated defendants' rights under the Sixth Amendment.

We live in a time when citizens are with increasing frequency confronted with accusations of violence made by persons unknown to them whose credibility must be challenged in front of a jury that sees the weight of government, often the mass media, and sometimes, as here, even the court, endorsing that witness. This is a difficult plight for any citizen. If the traditional possibility of discrediting a prosecution witness by showing his bad character is removed or rendered impossible by a bar to obtaining witnesses familiar with such character, then few citizens charged with

violent crimes by prosecutors will have any real chance of proving their innocence. When, as here, the prosecutor is allying himself with a person he knows to be a violent criminal in order to obtain a conviction of a citizen who happens to be politically disfavored, it is not easy to avoid the use of the adjective "fascist" in describing this process.

The Sixth Amendment plainly precludes taking the right to have compulsory process to obtain witnesses away from the defendant and replacing it with a dubiously effective dependence on the prosecution to subpoena crucial witnesses for the defense.

5. THE SUPREME COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER VIOLATIONS OF STATE LAW BY THE STATE JUDICIARY GIVE RISE TO AN INDEPENDENT FEDERAL GROUND OF DENIAL OF THE EQUAL PROTECTION CLAUSE OF

THE FOURTEENTH AMENDMENT.

With respect to this point, it is admitted by petitioners that if there is any rational basis whatsoever for the application of state law by a state court, then the state court opinion is final, and cannot be reviewed by the United States Supreme Court on certiorari.

But what if there is no rational basis whatsoever for a state application of state law? What if the denial of equal protection of state laws is so flagrant that to leave stand a conviction obtained thereby would be to condone the reduction of a United States citizen to a status of complete rightlessness? What if it is indisputably clear that a state court is engaging in deliberate violation of state laws in order to secure the opportunity to punish a disfavored citizen? Can the United States Supreme Court then take jurisdiction on cer-

tiorari even if there are no independent Federal grounds other than the plain denial of equal protection of state laws?

It is conceded that the denial of equal protection of state laws by a state court was not set up as an independent Federal grounds by petitioners while the action proceeded in state court.

There is presently only very slender authority for the proposition that when a state judiciary permits clear violations of state law, the denial of equal protection that flows therefrom is a violation of Federal constitutional rights secured by the Fourteenth Amendment, and that therefore the United States Supreme Court can take jurisdiction on certiorari to remedy the injustice.

The facts of the present case show, however, how empty the guarantees of due process of law and equal protection of laws are when a state court resolves to

deprive certain disfavored citizens of these rights.

In Hicks v. Oklahoma (1980) 447 U.S. 343, the Oklahoma state judiciary affirmed a forty-year prison sentence imposed in violation of the defendant's state-created right to have his sentence determined by a jury not misinstructed regarding unconstitutional mandatory sentencing laws.

The United States Supreme Court reversed and remanded for retrial on the issue of sentencing.

> Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of liberty only to the extent determined by the jury in the exercise of its statutory discretion, cf. Greenholtz v. Nebraska Penal Inmates, 442 US 1, 60 L Ed 2d 668, 99 S Ct 2100 (1979), and that liberty interest is one

> that the Fourteenth Amendment preserves against arbitrary deprivation by the State. [Cites omitted.]
>
> Hicks v. Oklahoma, supra, 447 U.S. at 346

It would appear then that some clear violations of state law by state judiciaries are reviewable on certiorari by the Unites States Supreme Court. But of course it is crucial to Federalism, as well as to judicial administration, that the United States Supreme Court not be called upon to take jurisdiction over every claimed violation of state law by state courts. As is always the case with maintaining the Federalist balance, the question to decide is how to safeguard the latitude of state courts in arriving at their own independent and final evaluations of the applicability of state law without giving the tacit endorsement and approval of the ultimate judicial protectors of the liberty of the citizenry, the United States

Supreme Court, to manifest atrocities.

Petitioners urge this Court to discern the flagrancy of the denials of equal protection of state laws which are recited here. Given this flagrancy, petitioners argue that they cannot, in any meaningful sense, be said to have been convicted through due process of law. In fact the compulsion to obtain convictions so animated the prosecution, the trial court, and the appellate panel which affirmed the convictions that to let these convictions stand ultimately would be to indelibly stain the very tradition of judicial protection of the rule of law. When it is taken into account, as is clear from the record in this case, if not from common knowledge, that petitioners are not criminals seeking to evade punishment for their acts by seizing upon some technicality of law, but political activists struggling against repression, then the danger of

toleration by the Supreme Court of flagrant violation of state laws by state judges is evident, and the issue of law raised is one of fundamental importance.

The following three instances of flagrant violations by the state judiciary of state law show the urgency of review by this Court of the denial of defendants' rights under the Fourteenth Amendment.

(1) The alleged victim of the August 26 incident, Troy Christensen, did not testify at trial (RT B 131:3-19). Petitioners were convicted mainly on the strength of testimony of a friend (Markley) of the alleged victim who testified he saw petitioners attack the alleged victim (RT D 329:13-339:3).

Petitioners moved for a new trial. One day prior to the hearing on the motion petitioners received in the mail attached to the prosecution's sentencing recommendation a partial copy of a declaration

from the alleged victim (apparently by accident) admitting he initiated the physical conflict:

> "I tried to grab the fellow who was earlier on the stairs by grabbing him before he had a chance to do any more damage to the car. . . "

(See A.O.B., 86; Statement on Appeal; App. 115a) Petitioners had never previously seen nor been informed of the existence of this declaration.

At the hearing on the motion for a new trial, petitioners moved the trial court to exercise its discretion pursuant to California Penal Code §1181(8) so that this new evidence could be properly assessed (RT D 1270:9-1271:1; 1280:28-1284:5).

The trial court refused to grant the continuance and refused to consider the new evidence. Petitioners several times brought to the court's attention Penal Code Section 1182 which requires the application for a new trial to be "made and deter-

mined before judgment." Nevertheless, the trial court stated that petitioners could bring another motion for a new trial at a later date and then proceeded to judgment and sentencing forthwith (RT D 1282:5-1284:8, 1288:3-17), thereby foreclosing petitioners from raising the motion.

The Appellate Department agreed that

> Penal Code section 1182 requires that an application for a new trial must be made and determined before judgment (and thus sentencing).

(Appendix, pg. 116a)

Nevertheless, the Appellate Department condoned, in opaque and implausible reasoning, this violation and commented:

> Appellants were allowed to file a new trial motion based on new evidence later. However, Appellants never filed another motion. Since Appellants never again presented the new evidence, Appellants cannot complain about the evidence not being considered....even if the new evidence had been considered by the Court, the new trial motion most likely would

> have been denied. Christensen's statement merely would have impeached or discredited Markley's testimony, a ground which does not compel the granting of a new trial.

(Appendix, pg. 117-118a)

State law holds that when the trial court misconceives or refuses to do its duty in regard to a motion for a new trial and denies defendant the reasonable opportunity for argument, a new trial must be granted. People v. Ashley (1954) 42 Cal.2d 246.

Petitioners have been prematurely sentenced and, more importantly, petitioners have yet to be heard on a valid motion for a new trial, which motion they have a well-recognized right to make.

(2) Petitioners have a right under state law to present to the jury evidence of the nature and number of the felony convictions of witnesses against them. People v. Terry (1974) 38 C.A.3d 432, 446. The Appellate Department recognized this right,

recognized that it had been violated, but then stated that the error actually helped petitioners since

> the jury was allowed to speculate that the prior felony conviction was worse than it actually was (i.e., worse than robbery or ex-felon in possession of a concealable firearm -- D. Wiltz's priors).

Appendix, page 74-75a.

This is simply not good faith reasoning. The Appellate Department was approving a clear violation of state law.

(3) Petitioners were not even permitted to argue that the witnesses against them from the police department and the District Attorney's office were testifying falsely. The trial court actually sustained an objection to this fundamental line of argument, and foreclosed further argument to that effect.

A preposterous interference with the right to make a final argument (statutory in California according to Cal. Penal Code

§1093; see People v Manning (1981) 120 C.A.3d 421, 423) occurred at trial, and the Appellate Department made a flagrantly false statement in approving of this interference:

> There was no evidence submitted from which Appellant Stevens could properly infer the police department and/or D.A.'s office were dishonest.

Appendix, p. 14a.

Is the testimony of defendants Stevens and Weissman contrary to the testimony of police officers to be regarded as no testimony at all? Did defendants not have a right under governing standards of due process to argue to the jury that their testimony was honest and that that of some of the police officers was not honest? To deny this right would obviously be to reduce the trial process to absurdity.

Yet that right was denied.

These denials of rights under state law do not entail ambiguous points of law.

The denials are clear, flagrant, and, as is obvious from the specious reasoning with which the Appellate Department attempted to justify them, deliberate.

Convictions could not have been obtained without employment of such means. The Appellate Department at several points asserts that the evidence was sufficiently strong that errors at trial were not harmful, but nowhere in its 69 page Opinion is there any analysis of what the Appellate Department considered that "strong" evidence to be.

In fact, the evidence was a series of for the most part uncorroborated testimony from prosecution witnesses who each claimed to see different things. Petitioners in their Opening Brief reviewed objectively and meticulously the evidence produced against them at trial (pp. 22-29). This review was not contradicted by the Appellate Department, but rather ignored.

Petitioners do not include this somewhat lengthy document in this petition for writ of certiorari, and recognize that to some extent they make an undocumented assertion in this sense. However, petitioners represent and aver to this Court that they sincerely believe that a review of the evidence by this Court, should the petition be granted, will reveal that the evidence produced at trial by the prosecution was in fact minimal.

The Appellate Department assessed the evidence against petitioners so carelessly that on page 43 of the Opinion (Appendix, p.86a) petitioners are stated to have been "beating him" (Wiltz) even though the jury returned an acquittal on the battery charges arising out of that incident.

The United States Supreme Court should not let stand convictions which so flagrantly violate the rights of United States citizens to due process of law and to equal

protection of all laws, including state laws interpreted by state courts.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

THOMAS W. STEVENS

LARRY WEISSMAN

RONALD LANDBERG

JEFF HUESTON

Petitioners Pro Se
1889 Oak Street
San Francisco, CA 94117

Telephone: (415) 386-9914

November 12, 1985

85-827 (2)

Supreme Court, U.S.
FILED
NOV 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS W. STEVENS, LARRY WEISSMAN, RONALD LANDBERG, JEFF HUESTON,

Petitioners,

-v-

STATE OF CALIFORNIA,

Respondent.

APPENDIX

To Petition for Writ of Certiorari to the Appellate Department of the Superior Court, in and for the City and County of San Francisco, State of California

THOMAS W. STEVENS
LARRY WEISSMAN
RONALD LANDBERG
JEFF HUESTON
1889 Oak Street
San Francisco, CA 94117
Telephone: (415) 386-9914
PETITIONERS PRO SE

November 12, 1985

256pp

PAGE #

INDEX TO APPENDIX

iv-a Declaration of Judy Grant Re: Appendix

1a Memorandum of Opinion, Superior Court of California, City and County of San Francisco, Appellate Department, dated August 26, 1985

139a Statement of Ruling on Demurrers on October 21, 1982

140a Partial Reporter's Transcript of Proceedings: Ruling on Motion to Suppress Evidence, January 25, 1983

145a Partial Reporter's Transcript of Proceedings: Ruling on Motion to Dismiss Discrimininatory Prosecutions, February 23, 1983

155a Judgment on Appeal from the Municipal Court of the City and County of San Francisco, State of California, dated August 26, 1985

158a Order in Re: Petition for Rehearing and Application for Certification to Court of Appeals, dated October 29, 1985

160a San Francisco Police Department Incident Report regarding August 14, 1982 incident

171a San Francisco Police Department Incident Report regarding August 26, 1982 incident

178a Complaint: State of California v. Thomas W. Stevens, Jeffery P. Hueston and Ronald I. Landberg, regarding the August 14, 1982 incident

180a Complaints: State of California v. Larry A. Weissman, Thomas Stevens, Ronald Landberg and Jeffery Hueston regarding the August 26, 1982 incident

187a Partial Reporter's Transcript of Motion to Suppress Evidence, January 25, 1983: Testimony of police officer

199a Partial Reporter's Transcript of January 25, 1983 showing introduc-

tion of evidence in support of motion to dismiss discriminatory prosecutions.

220a Partial Reporter's Transcript of trial: refusal to disclose address of witness to be subpoenaed (June 16, 1983)

226a Partial Reporter's Transcript, June 17, 1983: surprise testimony of police officer

230a Partial Reporter's Transcript, June 16, 1983: testimony of alleged victim differing from police officer's testimony.

232a Declaration of Arlo Smith, January 4, 1983, in opposition to defendants' motion to dismiss discriminatory prosecutions

238a Declaration of Gerald Koelling, January 4, 1983, in opposition to defendants' motion to dismiss discriminatory prosecutions

244a Explanation of Abbreviations used in citing Reporter's Transcripts

NO._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THOMAS W. STEVENS, LARRY WEISSMAN, RONALD LANDBERG, JEFF HUESTON, PETITIONERS, -v- STATE OF CALIFORNIA, RESPONDENT.	)

DECLARATION OF JUDY GRANT RE APPENDIX

I, JUDY GRANT, declare as follows:

I prepared the Appendix, consisting of 245 pages, to the petition for writ of certiorari in the above-captioned case.

The following items in the appendix were cut and laid out from a true and correct copy of the same:

1) Memorandum of Opinion issued by the Superior Court of the State of California, for the City and County of San Francisco, Appellate Department, dated August 26, 1985

2) Reporter's transcript of Proceedings dated January 25, 1983, Ruling on Motion to Suppress, before the Honorable Ina L. Gyemant of the San Francisco Municipal Court, State of California (reported and certified by Jerry M. Matsukado).

3) Partial reporter's transcript of proceedings held January 25, 1983 and February 23, 1983, pages 113-114; 117-118; 130-150; and

174-176, before the Honorable Ina L. Gyemant of the San Francisco Municipal Court, State of California (reported by Jerry M. Matsukado and certified by him on September 5, 1983).

4) Order in Re: Petition for Rehearing and Application for Certification to the Court of Appeals dated October 29, 1985

5) Complaint in the matter of State of California vs. Thomas W. Stevens, Jeffery P. Hueston and Ronald I. Landberg, executed on September 7, 1982

6) Complaint in the matter of State of California vs. Larry A. Weissman, executed on August 26, 1982

7) Complaint in the matter of State of California v. Thomas Stevens, Action No. 538642, executed September 16, 1982

8) Complaint in the matter of State of California v. Ronald Landberg, Jeffery Hueston, Action Nos. 538640 and 538638, executed on September 16, 1982

9) Partial reporter's transcript of trial, June 16 and June 17, 1983, pages 28; 50-51; 183-184, held before the Honorable Joseph A. Desmond, on appeal from the Judgment of the Municipal Court of the State of California, City and County of San Francisco, reported by Irene Marino and certified by her on January 31, 1984

10) Declaration of Arlo Smith dated January 4, 1983 and Declaration of Gerald Keolling dated January 4, 1983, filed in opposition to defendants' motion to dismiss discriminatory prosecutions

The following items in the appendix were typed from a true and correct copy of the same. I attempted to duplicate the format of the

original documents.

1) Judgment on Appeal from the Municipal Court of the City and County of San Francisco, issued by Superior Court of the State of California, Appellate Department on August 26, 1985

2) San Francisco Police Department Incident Report #821897185, dated August 14, 1982

3) San Francisco Police Department Incident Report #821941635, dated August 26, 1982

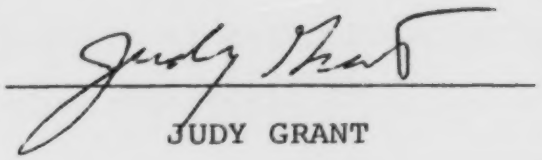
For most documents in the appendix, a true and correct copy is included so that the Court would have an undisputably authentic documentation of the assertions made in the petition.

The police reports and the Judgment on Appeal were retyped

because the type sizes in the originals did not comply with Supreme Court Rule 33.

All documents in the within appendix were carefully proofread and reviewed, and I swear of my own knowledge that they are true and correct copies.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on November 11, 1985.



JUDY GRANT

CALIFORNIA SUPERIOR COURT

CITY AND COUNTY OF SAN FRANCISCO

APPELLATE DIVISION

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. THOMAS W. STEVENS, RONALD LANDBERG, JEFFREY P. HUESTON, LARRY A. WEISSMAN, Defendants and Appellants.	)	NOS. CR-3308 3309 3310 3311 3312 3313 MEMORANDUM OF OPINION

1a

These are appeals from judgments of convictions of four individuals. The four Defendants were tried together, and, although the appeals have not been consolidated, all Appellants have filed one brief on appeal. We will, therefore, treat these matters as a single appeal.

The charges arose out of two separate incidents: August 14, 1982 and August 26, 1982. The transcripts filed with the appeal consist of over 1,600 pages, and Appellants have designated twenty-one issues on appeal.

Statement of Facts

August 14, 1982 Incident

On August 14, 1982 at approximately 12:30 - 1:00 p.m., Elbert Wiltz, a Municipal Railway employee, was walking across Oak Street at the corner of Cole. He was walking with his brother, Dellisandrew Wiltz. Elbert encountered a white female with a Sony Walkman radio. He was about 4-5 feet away from the woman when he asked if she was listening to a 49-er game. She replied yes and went on. He did not touch the woman or get close to her.

As Elbert continued up the street, he encountered four men (Appellants) who ran off some nearby stairs to stop Elbert. They grabbed Elbert. Elbert Wiltz testified he was choked by one Appellant, grabbed by the arm and held down by two Appellants and carried by the fourth across the street. Appellants detained Wiltz. Stevens testified that E. Wiltz punched Stevens and that Appellants intended to restrain Wiltz until the police arrived and then to make a citizens arrest. Wiltz testified he was punched and choked and he struggled for his freedom. Appellants had someone there with a videotape camera recording what was going on. While Elbert was being restrained, he asked his brother, Dellisandrew, to pretend to shoot at the Appellants, knowing Dellisandrew did not have a gun.

Two San Francisco police officers arrived (Officers Snuth and Phillips), ordered Appellants to get off Wiltz and eventually they complied. Officer Pera arrived later.

Appellants were arrested and charged with battery and false imprisonment. Appellants Stevens, Hueston and Landberg were found guilty as to the false imprisonment charge, but not guilty as to the battery charge.

August 26, 1982 Incident

On August 26, 1982 in the evening, Mr. Markley and Troy Christensen were at a night club called the I- Beam. After spending two hours there, at about midnight, they left and walked back to Christensen's car, a Triumph. They were singing as they were walking. They passed by a purple house on Cole

Street that belonged to Appellants. When they were close to the car, they heard a shout from the purple house. They ignored the shouts, continued singing and drove away.

As Christensen drove near the purple house he honked his horn. After, two people on the porch threw a 7-foot object towards the car. The object hit the side of the car and created a dent. Christensen stopped the car and got out to look at the dent. Two people came out of the house and ran towards Christensen. Christensen put his arms out at them. The two people wrestled Christensen to the ground and started hitting and kicking him. (One was Appellant Hueston). Stevens testified he was attacked by Christensen when he went out to see why a horn was being honked continuously. Three other men joined in the fight within twenty seconds approx. (Weissman

and Landberg and a third person not identified were there. Stevens stipulated he was present. Also, another individual, Mark Simonovski, was there. A whistle was blown by one of the men. There was conflicting testimony as to whether Weissman was on the scene when the whistle was blown or whether he was still on the steps of the house and then ran out when he heard the whistle (carrying a gun). Appellants continued to hit and kick Christensen while Markley watched. Markley tried to grab one of the Appellants but was told to keep out of it and he complied.

Markley got in the car and drove back to the I-Beam where he saw security officer Radley. Markley told Radley to contact the police. Markley brought Radley who had a gun back to the scene of the fighting. Markley saw Appellants still beating

Christensen. There were four to five men over Christensen, one on him, several holding him down.

When Radley arrived, he drew his gun, ordered Appellants to freeze, but most continued to hit Christensen, at least for a few seconds. Christensen had cuts on his face, neck and his shirt was torn and his nose was bleeding, but there were no marks on the others. Radley had the "assailants" line up against the cars and told Markley to call the police. Markley went to the I-Beam and brought back the bouncer with him.

The police arrived and talked to Markley, Christensen and the four "assailants". Prior to the police arrival, Radley said he noticed Appellant Weissman place his hands towards the midsection of his body. Radley instructed Weissman to keep his hands to his side, as Weissman had reached for the front of his

trousers a couple times.

Officers Geraty and Kelly arrived first. Geraty saw Radley holding the "assailants". Appellants were searched and a loaded revolver was found on Weissman, in a holster buckled behind his belt buckle on his pants. The officers took Appellants and Christensen to the police station and spoke to them. Christensen filled out a citizen's arrest form for the arrest of Appellants. Weissman was placed under arrest by Geraty because Geraty found the revolver.

All Appellants were charged with battery and Appellant Weissman was charged with violations of Penal Code Sections 12031 (loaded firearm), 12025(b) (concealed firearm), 415(1) (fighting in a public place), in addition to battery. Appellant Stevens was found guilty of battery; Landberg was

found guilty of battery; Hueston was found not guilty of battery; and Weissman was found guilty of battery and of violating P.C. 12031, but not guilty of violating P.C. 12025(b) and 415(1).

All Appellants were sentenced and offered probation as part of the sentence. All declined probation and were sentenced accordingly.

Appellants appeal from these convictions.

Issue 1: Whether there were acts of prosecutorial and judicial misconduct during Appellants' final argument which deprived Appellants of a fair trial.

Appellants argue that the prosecution continually disrupted their final argument for groundless or improper reasons and in doing so, committed acts of misconduct. In

addition, Appellants contend that the Court committed misconduct by condoning or ratifying the prosecutor's misconduct and that the Court was partial to the prosecution.

Appellants point out eight places during their final argument in which they feel they were subjected to misconduct. Most of these instances relate to objections made by the prosecution that Appellant Stevens was arguing facts not in evidence, speculating as to the evidence or mischaracterizing the evidence. For example, the following dialogue took place:

> MR. STEVENS: Here we have - we have to tell you the police department, parts of its, the District Attorney's Office, parts of its, aren't being honest. It's difficult to . . .

MR. LIPTON: Your Honor, that it not arguing evidence. It's arguing paranoia.

I think it's not sustained by the evidence in the record, your Honor.

I move that the Court direct Mr. Stevens to stay within the evidence, which is the proper scope of final argument.

THE COURT: Mr. Stevens, again, I will have to direct you to argue the facts, argue the witnesses.

Do not go farther.

You are allowed to go -- draw inferences -- must be based on the facts -- inferences must be drawn from the facts, which will be testified to.

Again, this is not a platform for a political speech,

Mr. Stevens.

Okay. So, please stick to the proper argument.

Go ahead, Mr. Stevens.

Appellants complain that the prosecutor's objection had no legal ground and that the accusation of "paranoia" was "unethical and insulting." (They considered the "paranoia" comment an accusation of mental illness). Moreover, Appellants argue that the Court, by agreeing with the prosecutor, that Appellants' argument was not sustained by the evidence, was blatantly partial to the prosecution. Also, the Court should not have made the "wisecrack" about a platform for a political speech.

While a counsel in summing up may indulge in all fair arguments in favor of his client's case, he may not assume

facts not in evidence or invite the jury to speculate as to unsupported inferences. Neumann v. Bishop (1976) 59 Cal.App.3d 451, 479. Attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct, whether by . . . argument, or other means. Smith v. Covell (1980) 100 Cal.App.3d 947, 960.

"It shall be the duty of the judge to control all proceedings during the trial, and to limit . . . the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matter involved." (Penal Code Section 1044) In exercising that control, however, the judge has a duty to be impartial and to make certain that the Defendant in a criminal case is afforded a fair trial. People v. Blackburn (1982) 139 Cal.App.

3d 761, 764.

If the prosecution's objection was proper here, to the extent the objection itself was made, there was no misconduct on behalf of the prosecutor. Also, if the objection was proper, the Court could properly sustain it. There was no evidence submitted from which Appellant Stevens could properly infer the police department and/or D.A.'s office were dishonest. Also, it was improper for Stevens to make personal attacks on the character or motives of the adverse party or his counsel. Stone v. Foster (1980) 106 Cal.App.3d 334, 353. Thus, Stevens' argument was going beyond the bounds of proper argument and it was proper for the prosecution to object. The fact that the Court "agreed" was within the Court's duty to limit argument to relevant matters and was not partial.

The comment about "arguing paranoia", while perhaps not the best choice of words, certainly does not imply Stevens had a mental illness. The statement was within legal boundaries. (Compare People v. Patterson (1953) 118 Cal.App.2d 45, 48, where the Court upheld a statement as within the bounds of argument by the D.A. that the Defendant was "worse than a rattlesnake.") The Court's comment about "a platform for a political speech" was within proper bounds of admonishing Stevens to argue evidence and did not seem to rise to the level of partiality on behalf of the Court. (The other examples listed in this issue are similar).

Given that the prosecutor had grounds for objecting to Stevens' argument, and the Court had grounds to sustain, there was no misconduct on the part of either the prosecutor or the

Court as Appellants allege. Also, although the statements by the prosecutor and the Court may not have been the best choice of words, they certainly did not rise to the level of misconduct requiring reversal.

Issue 2: Whether it was error for the Court to overrule Defendants' demurrers.

Appellants argue they were given insufficient notice of the charges against them with regard to the false imprisonment charge arising from the August 14th incident and the battery charge arising from the August 26th incident. Appellants demurred to the complaints; the demurrers were overruled on October 21, 1982.

Count II in the complaint for the August 14th incident read as follows:

"That the said defendants did in the City and County of San Francisco, State of California, on or about the 14th day of August, 1982, commit the crime of misdemeanor, to wit: violating Section 236 of the California Penal Code, in that said defendant(s) did willfully and unlawfully violate the personal liberty of Elbert Wiltz."

Appellants claim the police report indicates the victim was falsely imprisoned <u>until</u> the police arrived. At the trial, however, Officer Phillips testified that the victim (Wiltz) was falsely imprisoned for several minutes <u>after</u> being ordered by the police officers to release the victim. In this respect, Appellants argue they had no notice of the charge for false imprisonment <u>after</u> arrival of the police. Appellants therefore prepared their defense based on their contention that they had

legal grounds for detaining Wiltz <u>until</u> the police arrived.

The police report does not say specifically that Appellants falsely imprisoned Wiltz only until the police arrived. In fact, the police report indicates the officer told Appellants to let Wiltz up and asked Appellant Hueston why they were holding him, but Appellant Stevens shouted not to answer any questions.

Regardless of what was contained in the police report as to how long Wiltz was falsely imprisoned, the complaint was sufficient as pleaded. Penal Code Section 952 states in part:

> "In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without technical averments

> or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused . . ."

Penal Code Section 236 states:

> "False imprisonment is the unlawful violation of the personal liberty of another."

Section 952 allows the pleading to be in the words of the enactment describing the offense. Since the complaint uses the same words as the definition of false imprisonment (P.C. Section 236), it should be considered sufficient to give Appellants notice of the offense charged. Moreover, Section 952 has been held to meet due process requirements -- the accused is sufficiently informed of the offense with which he

is charged to be able to prepare his defense. People v. Quinn (1949) 94 C.A.2d 112, 116. It is not necessary to give the accused a detailed description of the particular circumstances of the offense. People v. Lamb (1962) 204 C.A.2d 255, 262-3.

Appellants admit in their reply brief that the current law permits pleading in the language of the statute and that the pleadings need not state with specificity the acts out of which the accused is charged. However, Appellants would like this Court to find that current law violates the 6th Amendment and to change the law to require more specificity in pleadings. This change would take us back several years. Early criminal pleading was lengthy, particular, detailed and full of technicalities and often led to reversal for variance despite convincing evidence of guilt at trial. Witkin, Cal. Crim. Proc.

Section 186. Modern courts have broken away from the traditional approach and in 1927 the Legislature established the modern rule encompassed in P.C. Section 952. Id. Also, what Appellants are asking for -- a notification that the false imprisonment extended to the time after the police arrived -- would require the complaint to detail the evidence the District Attorney would need to prove at trial. Criminal pleadings need not be this detailed.

Appellants cite a case from the Federal District Court in Alabama, Bozeman v. Lambert, Civil Action No. 83-H-579-N; Wilder v. Lambert, Civil Action No. 83-H-580-N (U.S. District Court, Central District of Alabama, Northern Div.), April 13, 1984. This case is distinguishable from the present case and does not apply.

Appellants were charged with battery after the August 26th incident. They argue that they should have been given notice that they were going to be "charged with 'using greater force than necessary to defend themselves.'" (Testimony was introduced at trial that Appellants used excessive force in self-defense.) This argument is without merit. It seems as though evidence of excessive force is admissible to rebut a claim of self-defense, without regard to the pleadings. Self-defense may be used in defense of a battery; however, any force which is excessive, i.e. unreasonable under the circumstances, is not justified. Witkin, Cal. Crimes Section 160 p. 153.

Regardless of the evidence presented at trial that force used was excessive, the complaint need only allege a battery charge under the rules mentioned above. The complaint in the

present case alleged willful and unlawful use of force and violence upon the person of Troy E. Christensen. Charging in the words of the statute, here, P.C. Section 242, is considered sufficient notice.

The lower court properly overruled Appellants' demurrers. In light of Penal Code Section 952 and California case law, the counts for both false imprisonment and battery were sufficient to give Appellants notice of the charges against them.

Issue 3: Whether the lower Court properly denied Appellants' motion to suppress.

Appellants moved to suppress evidence of the handgun found on Weissman. Their motion was denied on January 25, 1983 by the Honorable Ina Gyemant.

Appellants argue that Respondent failed to carry its

burden of showing the search of Appellant Weissman, which produced the handgun (and its paraphernalia), was proper. They contend that Respondent's method of proof was not sufficient. If Respondent did not establish a proper ground for searching Weissman without a warrant, the search would be illegal and the evidence should be suppressed.

Officer Geraty, the officer who searched Weissman, testified at the suppression hearing. He said he was summoned by a citizen and informed that there was a fight on the 400 block of Cole and that a patrol special was there. When he arrived he saw the special patrol officer and five persons with their hands against a vehicle and the patrol officer with a gun drawn. Officer Geraty spoke to Christensen who told the officer that a fight had ensued and that Weissman was one of

the combatants. The special patrol officer told Officer Geraty he saw Christensen being pinned down on the ground with Weissman on top. Officer Geraty explained that since it was a misdemeanor he could not make the arrest at first; however, Christensen could sign a citizen's arrest card. Christensen said he wished to press charges and placed the Appellants under arrest. Officer Geraty placed handcuffs on Weissman and searched him prior to taking him to the station. He had suspected something on Weissman's person around his midsection, as Weissman earlier had kept trying to place his hands there while being ordered to keep his hands on the vehicle. Also, Officer Geraty testified he searched Weissman for his safety and that of others prior to transport. He found a gun on Weissman.

Appellants objected on the ground that the testimony of

Officer Geraty was mostly hearsay. They made continuous objections at the suppression hearing. (Appellants would have liked the prosecution to put Christensen or the special patrol officer on the stand, rather than rely on hearsay testimony.)

After reviewing the transcript, it was clear that the judge had stressed several times that the hearsay testimony was only admissible for the purpose of probable cause, and not for the truth of the matter. The lower Court found the arrest was lawful and that the search incident to that arrest was proper.

A citizen may arrest another for a public offense committed or attempted in his (the citizen's) presence. Penal Code Section 846. Weissman was in Christensen's presence when Weissman committed the battery. Christensen signed the arrest card and placed him under citizen's arrest. Thus, the arrest

was proper. Once the arrest had taken place, a search incident to that arrest, even without a warrant, is reasonable.

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise the officer's safety might well be endangered and the arrest itself frustrated." Witkin, Crim. Proc. Supp. Section 953(2), citing Chimel v. California (1969) 395 U.S. 752.

Where the trial Court has found probable cause for a warrantless arrest or the reasonableness of a search, the Appellate Court will set aside such findings only if there is no substantial evidence in support. People v. Orr (1972) 26 C.A.3d 849, 857. Judge Gyemant weighed the evidence presented below and found probable cause and a reasonable search. There

was substantial evidence to support the lower Court's findings. The denial of the motion to suppress is affirmed.

Issue 4: Whether the lower Court erred in denying Appellants' motion to dismiss on the grounds of selective prosecution.

Appellants moved to dismiss the charges on the grounds of selective prosecution on February 23, 1983. The Honorable Ina Gyemant denied the motion.

Appellants argue they carried their burden in establising discriminatory prosecution and therefore the charges should have been dismissed

In order to establish a claim of discriminatory enforcement of a law the Defendant must prove: "(1) that he has been deliberately singled out for prosecution on the basis of some invidious criteria, and (2) that the prosecution would not have been pursued except for the discriminatory design of the prosecuting authorities." People v. Superior Court (Hartway) (1977) 19 Cal.3d 338, 348; Murgia v. Municipal Court (1975) 15 Cal.3d 286, 298. The Defendant has the burden of proving the defense of discriminatory enforcement because of the presumption that official duty has been properly performed. Evidence Code Section 664; People v. Superior Court (Hartway), supra, at

348.

Appellants presented the following evidence in the Court below: A memo from Captain Eimil of the S.F. Police Dept. to the Chief of Police discussing methods of obtaining greater prosecutions and obtaining stiffer penalties through community groups pressuring the Courts and D.A.'s office; a petition from 1978 by citizens seeking to limit the activity of the White Panthers; a television news story transcript in which it was indicated that then District Attorney Joseph Freitas intended to investigate the White Panthers; criminal complaints against various people who were allegedly members of the White Panthers over the last several years; a couple of articles from the San Francisco Examiner in 1979, 1981, (the articles apparently involved people who give information to the police in exchange

for immunity); allegations that Appellants had been charged with cases that were subsequently dismissed.

While the parties stipulated to the authenticity of the above documents, most of them did not amount to competent and relevant evidence. The articles did not relate to discrimination against the Panthers. The memo from Captain Eimil related to prostitution and Juvenile Court runaways. The complaints and affidavits were uncertified. The news story comment regarding investigating the White Panthers was considered by the Court as a newscaster's conclusion. The allegations of cases being dismissed were unsubstantiated.

The prosecution/respondent presented two declarations: one by Arlo Smith, D.A. and one by Gerald R. Koelling, Supervisor of trial attorneys in the D.A.'s office. These

declarations basically indicated that: they were unaware of the charges in these cases until called to their attention by the White Panthers after the prosecution had already begun; they did not discuss the White Panthers with the Mayor, Board of Supervisors or the staff of either, prior to being subpoened, (nor were they aware of anyone in the office who had done so); thousands of prosecutions of assault related type charges are filed each year, and from the information in the police report, this would be a typical situation to file a complaint, they were not nor were they aware of any intentions of the staff members who were prosecuting the White Panthers to remove them from any neighborhood in San Francisco or to intimidate them; finally, they had never instructed or permitted staff to file charges against the White Panthers or

any other group to retaliate, intimidate, harrass, etc., but only to file charges where the facts warrant criminal prosecution.

Appellants did not carry their burden below. They did not present competent or relevant evidence to establish the first prong -- i.e. that they were deliberately singled out on the basis of some invidious criteria.

Assuming, arguendo, that Appellants did establish the first prong, they did not present enough evidence to carry the burden for the second prong. They would have had to show that they would not have been prosecuted except for the discrimination against them. The only "evidence" presented below was oral argument (and reference to the police report) by Appellant Stevens that in one incident when the police arrived, the

Appellants and "victims" were fighting. The police arrested Appellants and not the others who were "equally" involved. Appellants claimed that it was a police decision to arrest those associated with the White Panthers and to "designate" the others as victims. Further, Appellants claimed the D.A.'s office would not accept a citizen's complaint filed by Stevens against the "victims." While this evidence is not that strong, it is difficult to tell what was really going on in the minds of the police. The August 14th incident occurred around the time the Registrar of Voters approved the recall petition for the Recall Campaign against Mayor Dianne Feinstein. Appellants claim in their lower Court brief (though do not document) that the mayor and other City officials made well-publicized attacks on the White Panther party because of the recall campaign.

However, Appellants would like this Court to get into the minds of the mayor, City officials, and the police. This subjective evidence does not seem to carry Appellants' burden. (Respondent's evidence below was also subjective; however, at least it was direct testimony of no intent to single out or to harrass the Panthers). The lower Court properly denied the motion to dismiss on grounds of discriminatory prosecution.

Appellants failed to carry their burden of proving discriminatory prosecution in the Court below. Thus, their motion was properly denied.

Issue 5: Whether there were discovery violations such that the testimony of Barbara Foster should have been suppressed.

This issue arises from the denial of Appellants' motion

to suppress Barbara Foster's testimony. (The Honorable Joseph Desmond) The motion was made on the first day of trial, June 6, 1983.

Barbara Foster was a witness to the August 26th incident. She lives across the street from 439 Cole, the White Panther office/home and the location of the fight. Respondent informed Appellants on the first day of trial that Ms. Foster had been discovered and gave Appellants a copy of a statement taken on June 3rd (three days prior).

Appellants argue that Respondent violated the existing discovery order which required both sides to give names and addresses of witnesses they might call, five days before pretrial. At the motion, the Assistant District Attorney, stated he found out about the existence of the report on the

6th and as soon as it was available to him, he turned it over to the defense. He further stated he became aware of the witness several days prior; however, he had no knowledge as to exactly who she was, where she could be located, how to contact her, etc. He claimed that once she was located and interviewed, he was led to believe someone else might have interviewed her first. The Assistant District Attorney also claimed that had the trial gone as scheduled in January or thereafter in May, he would have gone to trial without the witness -- it was only by accident, through discussions with other people, that she was discovered. Further, Alan Lipton had joined the D.A.'s office as of February 23, 1983 and first saw this case a week before the May trial date.

Appellants argued that since the D.A.'s office knew about

the existence of the witness a few weeks before, the office should have notified Appellants that it "might" call her. Further, Appellants argued it was a calculated effort not to tell them about the witness. Appellants alleged that the D.A.'s investigator knew about the witness but did not tell the D.A. It would not be fair to allow the D.A.'s office to "manipulate" its investigators so the D.A. could postpone discovery.

At trial, Barbara Foster testified that she called the police on the night of August 26th. She also said she spoke with Officer Radley at the I-Beam a couple weeks later. She heard from the police again around December and Officer Radley took a taped statement from her then. She later got phone calls from Park Station, but nothing ever resulted from

these. It was not until early June that someone from the D.A.'s office contacted her.

There was a conflict as to when the witness was discovered by the District Attorney. It appears from her testimony at trial that she had contact with the police prior to June, but that she was not in contact with the D.A. until June. At the motion to suppress hearing it was one word against another (on argument) as to when the D.A. discovered Ms. Foster.

Regardless of whether Respondent was in violation of the discovery order, the lower Court granted the proper remedy. "If the truth is to be served, the failure to disclose, at least where not willful, should not be punished by the suppression of evidence, but by giving the offended party a proper opportunity to meet the new evidence." People v. Reyes

(1974) 12 Cal.3d 486, 502, citing People v. McRae 256 Cal.App.2d 95, 104.

In People v. Reyes, a similar situation occurred. Shortly after the beginning of trial a witness was interviewed by the police and the prosecutor gave the defense a copy of the report. It was learned that police had previously talked with that witness on the day the crime occurred. The trial Court found that the failure of the police to comply with the discovery order and disclose the name of the witness was inadvertent, unintentional and without negligence. The trial court offered the Defendant a continuance to allow him to meet the new testimony. The Supreme Court in Reyes held that a continuance was the proper remedy under the circumstances.

In the present case, the lower Court granted a seven day

continuance of the trial to allow Appellants an opportunity to interview the witness. There was no evidence presented (although Appellants argued) that the D.A.'s failure to discover was willful or intentional; nor was there any showing of prejudice to Appellants that could not be cured by the granting of a continuance.

Issue 6: Whether the failure of the prosecution to reveal testimony of prosecution witnesses on discovery and the Court's denial of a portion of Appellants' discovery motion were improper.

It is difficult to determine what Appellants are arguing in this issue. Appellants allege that the prosecution failed to reveal testimony of two police officers to the defense. Apparently, the officers testified to things that were not in

the police report (regarding the August 14th incident) nor in any other source available to Appellants. For example, Officer Phillips testified that Defendants refused to release Wiltz for several minutes after he ordered them to release Wiltz. He testified that he had to tell Defendants three times to release Wiltz and that he was then released only upon Stevens' 'direction and command.' Also, Officer Pera testified that Stevens attempted to make a deal with him that if Wiltz would drop charges, then Stevens would also. Officer Pera said he regarded this as an admission of wrongdoing on Stevens' part. Appellants argue they should have been notified of this testimony.

Appellants then bring the Court into this issue. They contend the lower Court's discovery rulings did not meet the

minimum standard as required by People v. Alexander (1983) 140 C.A.3d 647. With regard to 'statements', the standing discovery order of the Municipal Court provided for discovery of:

> "(3) All statements and utterances of said testifying witnesses relating to the case against defendant(s) however recorded or preserved, whether or not signed or acknowledged by said witnesses."

Defendants moved to discover:

> "Any written or oral communications, made by or between members and employees of the District Attorney's office and/or the San Francisco Police Department, however preserved, concerning percipient witnesses and/or the taking of witness statements for the August 14, 1982 and August 26, 1982 incidents."

Appellants' motion was denied by the Honorable Ina Gyemant.

Appellants' arguments are without merit. The Court's denial of discovery of written or oral communication made by or between members of the D.A. or police was proper. Not only could Appellants' discovery request present work product problems, but the District Attorney is not required to make notes of conversations nor to preserve them. People v. Alexander, supra, at 659. In Alexander, the defense requested the Court order that the D.A.'s investigation reduce oral conversations to writing in detail. The Court's refusal to grant this request was upheld on appeal. The Court stated: "What is essential is that the Defendant receive the fruits of the law enforcement authorities' investigations." Id. In Alexander, the defense was granted discovery of all investiga-

tive reports, the investigators written material, witnesses' statements taken, and more conventional discovery items, such as photographs, other tangible evidence, criminal records of witnesses and the names and addresses of people who provided information. Id. The Court held the defense was not deprived of all pertinent information in the hands of the prosecution. Id.

While Alexander is not directly on point, it is clear that Appellants here received the "fruits of the law enforcement authorities' investigations." At the discovery motion hearing, Appellants were granted several items: police records of the victims as to arrest for assaultive conduct; felony conviction records of all percipient witnesses; communication tapes of the August 26th and August 14th incidents; an order

that the D.A. make available the victim for interviews by the Appellants; any notes, handwriting or reports made by any police officers in connection with the case; all records of statements, however preserved, made by police officers; any report filled out by patrol special Radley; citizens arrest card; results of lab tests and any reports regarding the tests. Thus, Appellants were granted an extensive amount of information including notes or reports and statements of police officers. Moreover, to require discovery of communications between the D.A.'s office and police department would place an incredible burden on the prosecution. It would be difficult for the D.A. to know everything that went on between the two offices.

It appears that Appellants would like to know everything

every witness will say at trial. Further, Appellants would like to establish a requirement that prospective witnesses, particularly police officers, make sworn statements at the time charges are brought. They condemn the integrity of the prosecution ("prosecutorial practice of encouraging officers to leave crucial data out of police reports;" "it is their (the prosecutors') general policy to avoid written statements of any kind." (Appellants' opening brief).) The problem seems to turn on Appellants' distrust of the District Attorney's office and not on any error of law below.

The lower Court's refusal to order the District Attorney to provide any written or oral communications made by or between members and employees of the D.A.'s office and/or the S.F. Police Department was proper. It would be unreasonable to

require the prosecution to provide this information.

Issue 7: Whether the trial Court erred in quashing Appellants' subpoena duces tecum (and in denying the request for in-camera review) of Elbert Wiltz's Muni personnel records relating to disciplinary matters.

Appellants served a subpoena duces tecum for Elbert Wiltz's Municipal Railway personnel records relating to disciplinary matters or proceedings, and particularly relating to violent actions against women. Appellants hoped to discover information about people familiar with Wiltz's "violent" character. The City moved to quash the subpoena.

The Court granted the motion to quash on several grounds: privilege (Evidence Code Section 1040), defective affidavit, untimeliness (the subpoena was served on Friday, June 10th and

the motion to quash was heard on June 15th, after the jury had been selected and sworn in. (The subpoena should have been served at the time of the rest of discovery was made. Discovery now would prolong the trial.)

It is unclear from the record below whether Appellants were actually trying to subpoena the personnel records under C.C.P. Section 1985 or follow the Pitchess procedure, (Pitchess v. Superior Court (1974) 11 Cal.3d 531) now embodied in Evidence Code Section 1043.

Untimeliness

Assuming the request is treated as a quasi-Pitchess motion, the lower court properly found Appellants' request untimely. The motion would be untimely on two grounds. First, the motion was made at the time of trial. The subpoena was

served on June 10, 1983, and filed June 14th, one day after jury selection began. Appellants were arrested back in August, 1982 and arraigned in September. They had almost a year to prepare this case. In this respect, they could have conducted discovery much earlier, instead of waiting until the last minute.

In determining whether to grant a motion for discovery, the trial court may consider the timeliness of the motion. Hill v. Superior Court (1974) 10 Cal.3d 812, 821. In Hill, the court in dictum indicated that "although in general motions for discovery may be made either at or before trial, a motion for discovery of felony conviction records . . ., if made at trial, in many cases might delay the trial if the motion were granted. Such a motion ordinarily should be made at a time when it would

not have that effect." Id. In the present case, the discovery request was similar to one for felony records; the Muni personnel records would be used for impeachment purposes as would records of felony convictions. However, here even more time would be required if the personnel files were held discoverable. Appellants would have needed time to interview any people who had complained about Elbert Wiltz which would have delayed the trial. Therefore, it was within the Court's discretion to deny the motion on the ground it was untimely.

Second, assuming the request was a quasi Pitchess motion, Evidence Code Section 1043 requires that Pitchess motions (motions for discovery of police officer personnel records, to be discussed, infra) be filed upon 10 days written notice to the governmental agency which has custody and control of such

records. The code also requires that upon receipt of the notice, the governmental agency shall immediately notify the individual whose records are sought. In the present case, as mentioned above, the subpoena was served on June 10, 1983 and the motion (to quash) was heard on June 15, 1983. In essence, Appellants' subpoena only allowed the City 5 days notice, and therefore, was also untimely under Evidence Code Section 1043.

Sufficiency of the Affidavit

Under Evidence Code Section 1043, the Pitchess motion must include a description of the type of records or information sought. Also required are "affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that such

governmental agency identified has such records or information from such records." Cal. Evidence Code Section 1043(b)(3). The affidavit need not be based on personal knowledge, as the Defendant, being the only one able to make such an affidavit, would be compelled to surrender some part of the constitutional protections against self-incrimination. Hogan, Modern California Discovery 3d, (1981) Vol. 3, Section 20.05, p. 156, citing People v. Municipal Court (Hayden) (1980) 102 Cal.App.3d 181, 185.

Overall, the Defendant must demonstrate that the requested information will facilitate the ascertainment of the facts and a fair trial. Pitchess v. Superior Court (1974) 11 Cal.3d 531, 536. The requisite showing may be satisfied by general allegation which establish some cause for discovery

other than "a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime." Id. at 537. The Court in Pitchess hesitated to apply the more strict standard embodied in the Code of Civil Procedure Section 1985 (to be discussed infra), as it would be "likely that Fifth Amendment problems would develop in many instances." Id. at 536.

It is unclear, however, whether we should apply a Pitchess standard or a more strict one as that in Code of Civil Procedure Section 1985. Pitchess motions involve a unique situation. The Defendant is charged with some form of assaultive or resistive conduct against a peace officer and is planning to claim self-defense. The Defendant seeks evidence of an officer's tendency to violence by requesting the

officer's personnel file (the file may contain, for example, citizen complaints, internal investigations or discipline imposed as a result of investigations). See generally, Hogan, Modern California Discovery 3d, Vol. 3, Chapter 20. In these types of motions, the Court applies the above standard. Id.

In Pacific Lighting Leasing Co. v. Superior Court (1976) 60 Cal.App.3d 552, the Court applied a different standard. The Defendants in Pacific Lighting were charged with grand theft in connection with transactions between Defendants and Pacific Lighting. Defendants tried to discover certain personal property lease files, corporation articles, bylaws, minutes, licenses and financial statements of Pacific Lighting. Pacific Lighting moved to quash the subpoena. The Appellate Court concluded that a private non-party is subject to a subpoena

duces tecum in a criminal case. Id. at 563. However, the Court noted that a different showing may be required to justify production of documents by a private non-party witness over his constitutional objection, than that which is required where the discovery is sought from the prosecution or from a law enforcement agency. Id. The Court pointed out that in Pitchess type cases, the party from whom the records were sought had no standing to assert rights against unreasonable search and seizure, whereas a private party such as Pacific Lighting does.

Code of Civil Procedure Section 1985 requires a showing of good cause and specific facts supporting the materiality of the request and thereby protects against unreasonable search and seizure. Id. at 565. The Court opined that the standard in Pitchess does not appear to be an adequate substitute for a

showing of good cause when constitutional rights to be protected are asserted. Id. The Court indicated that where no Fifth Amendment problems are posed (i.e., if an affidavit must be based on personal knowledge of the Defendant, it might subject the Defendant to possible self-incrimination), "there is little reason to excuse the accused from compliance with the normal requirement that the party seeking discovery of documents furnish 'factual data by the required affidavit' justifying disclosure." Id. at 567, citing Johnson v. Superior Court (1968) 258 Cal.App.2d 829, 837 (infra).

In the present case, Appellants were charged with assaultive conduct against a private citizen, Elbert Wiltz, and not a police officer. However, Appellants wanted to show that Elbert Wiltz had a violent tendency and that they were defend-

ing themselves against him. Thus, this case involves the same type of records sought as in Pitchess, but not the same party from whom the records were sought. Here, the records sought from the Muni Railway involve a separate agency and a private citizen (the City Attorney did make a privacy objection), not a law enforcement agency who is an arm of the prosecution. At the same time, however, the Muni Railway is a public agency and not a private company as in Pacific Lighting.

If we treat Appellants' request more like a Pitchess motion and apply the Pitchess standard, the sufficiency of the affidavit is a close question. Allegations by Appellant Landberg on information and belief are sufficient under a Pitchess standard. However, the issue is whether Landberg sufficiently sets forth the materiality of the personnel

records.

In Pitchess, the Court found sufficient an affidavit alleging that the disciplinary records are necessary as character evidence of the deputies' tendency to violence in support of Defendant's theory of self-defense. In People v. Municipal Court (Bonner) (1980) 104 Cal.App.3d 685, the Court found insufficient an affidavit alleging merely (on information and belief) that the conduct of the officer towards the Defendant is material and relevant to the defense of the Defendant in that "the degree of provocation and the issue of self-defense may in fact be an issue at said trial." Id. at 700. The affidavit in the present case points out the items may be relevant as showing the character of Wiltz (and propensity for violence, etc.). However, it does not show how it

will be used, i.e., self-defense theory as did the affidavit upheld in Pitchess.

Under the more stringent standard embodied in Code of Civil Procedure Section 1985, the affidavit is clearly insufficient.

Code of Civil Procedure Section 1985 provides in part:

> "A copy of an affidavit shall be served with a subpoena duces tecum . . . showing good cause for the production of the matters and things described in such subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his possession or under his control." (emphasis added).

In addition, it has been held that an affidavit wherein the

material facts necessary for the issuance of a subpoena duces tecum are alleged only on information and belief without setting forth supporting facts is insufficient. Johnson v. Superior Court (1968) 258 Cal.App.2d 829, 836. Thus, the affidavit must set forth supporting facts if based on information and belief. A subpoena duces tecum has no force or effect if the affidavit required by Section 1985 of the Code of Civil Procedure does not comply with the provisions of that section. Id. at 835. "The party seeking discovery must specify an issue in the case to which the documents sought are material. Specific facts must be stated to establish how and in what manner the documents are material to such issues." Weil and Brown, Cal. Prac. Guide, Civil Procedure Before Trial (1985) Chapter 8, Discovery Section 8:676, citing Flora Crane

Services v. Superior Court (1965) 334 Cal.App.2d 767, 785-89. Legal conclusions are insufficient. Id.; See also Johnson, supra, at 835.

In Johnson, the trial court ordered compliance with a subpoena duces tecum requiring the Defendant to produce certain documents. Basically, the declaration in support of the subpoena alleged on information and belief "that Arthur E. Johnson has in his possession the following documents listed in Exhibit A (therein)." It also alleged the affiant believed the documents are material to prove the allegations of the complaint. The Appellate Court found the affidavit insufficient on several grounds: that the declaration failed to show any facts supporting the alleged materiality and was devoid of allegations regarding good cause. Similarly, "the entire

declaration is based on information and belief without a statement supporting facts." Johnson, supra, at 837.

The affidavit in the present case fails to set forth facts showing how and in what manner the documents are material to the issues, especially with regard to Wiltz's offensive actions toward women. Landberg merely alleges the items may be relevant to show Elbert Wiltz's character. The affidavit fails to show how violence and violent actions against women are relevant to the case, and how and in what manner the complaints and disciplinary proceedings in Wiltz's records are material to these issues. (There are no facts alleged re materiality). Moreover, most of the affidavit is set forth on information and belief. While these allegations may be sufficient under Pitchess, they are not under the C.C.P. standard. See, e.g.,

Johnson, supra. Landberg fails to set forth facts supporting his information and belief, i.e., why he so believes.

If we treat Appellants' subpoena duces tecum as falling under Code of Civil Procedure Section 1985, the Court's order quashing the subpoena was clearly correct. Even if we treat it as a Pitchess type discovery motion, no excuse was offered by Appellants for the delay in filing. Further, if error was committed by the trial court, it was clearly harmless. Appellants had access to Wiltz's criminal record and in fact used that record to impeach him.

Issue 8: Whether the trial Court abused its discretion by foreclosing cross-examination of Elbert Wiltz and Dellisandrew Wiltz as to the name, nature and number of their felony convictions.

Appellants argue they were improperly precluded from cross-examining Elbert Wiltz and Dellisandrew Wiltz, as to the name, nature and number of their (the Wiltz's) felony convictions, at two separate points during the trial.

First, on cross-examination of Elbert Wiltz, Appellants asked whether he recalled being convicted of grand theft, to which Mr. Wiltz responded he may have been. Then Appellants asked whether he recalled being convicted of rape, to which a no answer followed. The Court sustained Respondent's objection to that question. The Court then advised Appellants that they were entitled to ask the witness if he was ever convicted of a felony and then "that is it." Appellants then asked whether Wiltz recalled being convicted of child molesting and Respondent objected. The Court instructed Appellants that

(they were) not to inquire into the nature of the crime, but that they could ask only whether the witness had ever been convicted of a felony. A discussion ensued. Appellants cited orally, People v. Terry (1974) 38 Cal.App.3d 432 (to be discussed infra). The Court then indicated that even if the case stood for the point Appellants were arguing (that they could inquire into the name and nature of the crime and date and place of conviction), the Court would still sustain the objection under Evidence Code 352 (on the ground that the purpose of asking the question was not for impeachment, but to influence or prejudice the jury). The District Attorney admitted in his opening statement that Elbert Wiltz was an ex-felon.

Second, on examining Dellisandrew Wiltz (whom Appellants

called), Appellants asked whether D. Wiltz was ever convicted of a felony. Respondent's counsel objected and requested a (contempt) citation. When Appellants asked what felony D. Wiltz had been convicted of, the Court sustained Respondent's objection. The same thing occurred with regard to Appellants' question as to the number of felonies. A discussion in the Judge's chambers then took place. Appellants were told they were allowed to ask if the witness had ever been convicted of a felony and that the matter stopped there (as the Judge indicated earlier). The case of People v. Terry was again presented. The Court indicated it had not read the case, but thought the case related to questions of prior convictions which show the Defendant has a propensity to commit the charge; thus, it was different (from the impeachment issue). The Court

later said "It's immaterial whether he had been convicted for one felony or 55 felonies; he's an ex-felon, and that is before the jury, and that is as far as you can go."

Evidence of a witness' prior felony convictions is admissible to impeach his credibility. (Cal. Evid. Code Section 788) This inquiry is restricted to the name and nature of the crime and the date and place of conviction. People v. Terry (1974) 38 Cal.App.3d 432, 446) Thus, the permissible scope of inquiry into a Defendant's prior felony record includes the right to question the Defendant as to the number of felonies of which he has been convicted and when they were committed (as long as it can be shown the conviction existed). People v. McClellan (1969) 71 Cal.2d 793, 809.

With regard to the cross-examination of Elbert Wiltz, the

Court could properly disallow the questions asked, under Evid. Code Section 352, which provides in part:

> "The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantive danger of undue prejudice of confusing the issues, or of misleading the jury."

It was within the Court's discretion to disallow the questions of whether E. Wiltz had been convicted of rape and child molestation. These questions could indeed prejudice the jury. Absent an abuse of the Court's discretion, the lower Court's ruling (in determining whether evidence is relevant), should be upheld. People v. Diamond (1970) 10 Cal.App.3d 798.

The Court's ruling that the inquiry stops after the witness answers "yes" to whether he's been convicted of a

felony is erroneous in light of People v. Terry, supra, and People v. McClellan, supra. Appellants should have been allowed to inquire into the name, nature, number of felonies and date and places of conviction, as permitted by these cases. The Court's ruling did not affect the questions asked of Elbert Wiltz as there were other grounds to sustain the objection made. 'Evidence Code Section 352). 1/ However, with regard to the questions asked (but not allowed to be answered) of Dellisandrew Wiltz, the Court should not have sustained the objections. The questions of whether D. Wiltz was ever convicted of a felony, of what felony and how many should have been allowed under the Terry and McClellan cases. (The Judge indicated that Terry involved questions to show propensity and thus did not apply to the present case. However, Terry also

involved the issue of impeachment. In Terry, the Defendant was asked whether he was convicted of a fraudulent check charge and two robberies, (which was proper inquiry). The Defendant was then asked if the robberies were of finance companies. On appeal the People conceded the Defendant should not have been required to divulge the scene of the robberies because it exceeded the proper scope of inquiry into a Defendants' prior convictions. After discussing Evidence Code Section 788 and the scope of inquiry, the Court agreed the inquiry exceeded the restrictions. People v. Terry, supra, at 446.)

Conclusion

Having determined that the lower Court erred in not allowing Appellants' questions, we must determine whether the error was prejudicial to Appellants. Given the felony

convictions of both Elbert and Dellisandrew Wiltz, had they been revealed in more depth (at least within the proper scope of inquiry), the jury may not have given as much weight to their testimony as to how the August 14th incident occurred. However, in light of the rest of the evidence presented below, we cannot say that a result more favorable to Appellants would have been reached in absence of the error.

In determining whether the error was prejudicial here, it is helpful to examine the reasons other Courts have found this procedure of "sanitizing priors" to be error. In People v. Rollo (1977) 20 Cal.3d 109, the Defendant was charged with receiving stolen property, but had previously been convicted of soliciting another to commit murder. The trial court allowed

the prosecutor to ask the Defendant if he had ever been convicted of a felony without revealing the nature of the prior. The Court found that "attempt to lessen the prejudicial effect of the prior conviction ineffective because, although it removed the direct prejudice caused by identifying the prior crime, it created other risks of harm equally severe." People v. Barrick (1982) 33 Cal.3d 115, 124, citing People v. Rollo, supra. The Rollo Court discussed two risks created: (1) that the procedure frustrates a prime function of the jury by hindering their determination of the probative value of the prior and, (2) that the procedure arouses the jury's curiosity about the identity of the prior offense. ("Normal human curiosity will inevitably lead to brisk speculation on the nature of that conviction, and the range of such speculation will be limited

solely by the imaginations of the individual jurors." Rollo, supra, at 119). Thus, the jury may speculate that the prior conviction was worse than it actually was. (In Rollo, the Court discusses how the jury may speculate. One avenue is that the conviction involved some form of unspeakable conduct such as torture, murder, gang rape or child molestation. Id.)

It is interesting to note that the error here actually helped Appellants. Appellants called Dellisandrew Wiltz as their (adverse) witness. D. Wiltz was the only witness who could corroborate Elbert Wiltz's version of the story. Appellants were hoping to discredit/impeach his testimony. Since only the fact that D. Wiltz had been convicted of a felony was revealed, the jury was allowed to speculate that the prior felony conviction was worse than it actually was. (i.e., worse

than robbery or ex-felon in possession of a concealable firearm -- D. Wiltz's priors). If the error was harmful to D. Wiltz's credibility, it only helped Appellants. Therefore, the error was not prejudicial to Appellants.

There is yet another reason why the error was not as prejudicial to Appellants as a sanitized felony normally can be. In Rollo, the Court gave another way in which the jury may speculate: "that the Defendant's prior conviction was similar to or identical with the charge for which he is on trial." Id. Many of the cases involve a Defendant who is being charged with a crime similar to one for which he/she has been convicted in the past. If the jury is told the Defendant had previously been convicted of "a felony," the jury may think it's the same crime as the charge for which he is on trial.

"(I)f he did it once, he will do it again." People v. Barrick, supra, at 127.

In the present case, the error affects a witness, and not the Defendant who is on trial. The danger that the jury may speculate that the prior is the same does not exist here. Thus, the range of speculation is narrower which thereby reduces the prejudice to Appellants.

For these reasons, the lower Court's error was harmless.

Issue 9: Whether the trial Court abused its discretion in foreclosing cross-examination of Elbert Wiltz as to whether there were pending charges against him.

In the lower Court, Appellants attempted to cross-examine Elbert Wiltz regarding possible pending charges against him. Apparently, there was an article in the San Francisco Examiner

on May 9, 1983 indicating that several people were arrested on narcotics and weapons charges at 2003 Pine Street on May 8, 1983. 2003 Pine is listed in the article as Elbert Wiltz's address. Appellants believed it was likely that the people arrested were either friends or relatives of Elbert Wiltz and/or Elbert Wiltz himself. They argue, in essence, that if there were pending charges against any of these people, it would be likely that Wiltz would be biased in favor of the prosecution to seek leniency in the disposition of the pending charges.

The following dialogue took place in the lower Court:

> MR. STEVENS: Q. Did you discuss any pending criminal charges with Miss Laskowski (District Attorney's investigator) -- pending criminal charges?
> MR. LIPTON: Objection, irrelevant.

THE COURT: That assumes facts not in evidence, and, you know, I will have to sustain the objection, but I want the jury to ignore that question because it assumes facts not in evidence, you know.
MR. LIPTON: Also clearly improper impeachment, no -- no foundation.
MR. STEVENS: Very well, your Honor. We have got People v. Goya (phonetic spelling) (sic; People v. Coyer), where the defense may imply that a charge, that a charge -- where there are charges pending against a witness -- tending to -- seeking leniency to testifying --
THE COURT: But that it --
MR. LIPTON: Your Honor, there has to be a good faith belief that there are pending charges -- there is no knowledge on the part of the defense or the prosecution as --
THE COURT: The objection is sustained.

Appellants then attempted to tie Elbert Wiltz to the address as listed in the article by asking him his address. The following took place:

MR. STEVENS: Q. What is your address, Mr. Wiltz?
MR. LIPTON: Objection, irrelevant.
THE COURT: Overruled.
MR. LIPTON: Your Honor, I have insued Mr. Wiltz that he is testifying in this under the protection of the District Attorney, because of his state of mind with respect to these defendants . . ..

THE COURT: That is a normal background question.
MR. LIPTON: That is true, but under these circumstances . . .
MR. STEVENS: We know his address. We are trying to get it into evidence.
THE COURT: If you know his address, there is no reason to ask the question.
MR. STEVENS: I want it in evidence.
THE COURT: I would allow the question, if he still lives in the City and County of San Francisco.
MR. STEVENS: Q. Do you still live in the City and County of San Francisco?
A. That is correct.
Q. Do you live at 2003 Pine Street?
MR. LIPTON: Objection. Same objection.
THE COURT: Sustained.

MR. STEVENS: Q. Did the house that you live at get raided by the police within the last two months?
MR. LIPTON: Objection, irrelevant.
MR. STEVENS: Now come on. Your Honor --
THE COURT: Sustained. It is not relevant -- not relevant to the charges that are --
MR. STEVENS: I'm trying to bring it out. There may be pending charges, your Honor, or if there are not, I'm trying to find out why there aren't.
THE COURT: This is not the forum for that. The objection is sustained. Next question.
MR. STEVENS: Your Honor, respectfully, may the record show that we do take strong exception to the ruling, but we will get off the subject, since you ruled.
THE COURT: Very good, and the record will so indicate.

Appellants argue on appeal that they should have been allowed to ask Wiltz whether there were pending charges against him and what was his address. "During trial, defense counsel is permitted to inquire whether charges are pending against a

witness as a circumstance tending to show that the witness may be seeking leniency through testifying." People v. Coyer (1983) 142 Cal.App.3d 839, 842. Also, as the lower Court in the instant case so indicated, it is proper to allow the question of what is a witness' address. Smith v. Illinois (1967) 390 U.S. 129, 131.

While it is proper to ask a witness whether there are pending charges against him, the manner in which Appellants questioned Wiltz was indeed objectionable. Appellants cannot assume there were charges pending, i.e., facts not in evidence, without first laying a foundation of pending charges (for example, the question about the conversation with the D.A. investigator would follow a "yes" answer to a question of whether there were charges pending against the witness.). It

seems clear that the questions regarding both the pending charges and Wiltz's address were an attempt to question Wiltz as to whether there were charges pending against him. If Appellants had not been representing themselves and instead had had an attorney, perhaps the questions would have been asked properly and therefore allowed. (With regard to the address question, it was unclear from the Court's ruling whether Appellants could ask Wiltz his address or whether they could only ask if Wiltz still lived in San Francisco. Since the objection was sustained when Wiltz was asked if he lived at 2003 Pine, it appears the Court did not allow Appellants to ask Wiltz his address. Or, perhaps if Appellants asked, 'What is your address' instead, it is possible the Court would have allowed an answer.)

Since it is within the trial Court's discretion to oversee the crossexamination process, it would be within the Court's discretion to consider the questions as asked and not to give Appellants the assistance they would have had if any attorney had represented them. Thus, the lower Court could properly sustain the objections made without violating the rule in People v. Coyer, supra.

Issue 10: Whether the trial Court abused its discretion by foreclosing examination of Dellisandrew Wiltz as to whether he was on probation or in violation of probation.

Appellants attempted to ask Dellisandrew Wiltz whether he was on probation. Respondent objected and the lower Court ultimately sustained the objection. Appellants believed D. Wiltz was subject to arrest in Santa Monica. Allegedly, D.

Wiltz was on probation for a burglary charge. D. Wiltz violated that probation and a warrant was issued in Santa Monica on October 15, 1972. According to Appellants the warrant was still outstanding at the time of the trial. Appellants made an offer of proof by giving the judge (out of the presence of the jury) a "certified copy of a docket sheet from Santa Monica" on which it indicated that a judge had issued the warrant and revoked the probation.

The Court seemed to sustain the objection on three grounds: (1) no indication the particular warrant was in the warrant system and therefore outstanding; (2) the warrant/probation revocation was too remote in time and therefore prejudicial; (3) the distance between Santa Monica and San Francisco Courts was too remote.

The docket sheet submitted by Appellants is not in the records on appeal. Appellants presented no other evidence indicating that D. Wiltz was even on probation or in violation of probation. While a witness' probationary status may be used to show his potential bias or prejudice based on concern of jeopardy to his probation, People v. Coyer (1983) 142 Cal.App.3d 839, 842, the lower Court properly sustained the objection. There was insufficient evidence supporting Appellants' allegations. Without proof that the warrant for D. Wiltz was still outstanding, the fact that a warrant was issued in 1972 would be more prejudicial than probative. Thus, it was within the Court's discretion to preclude Appellants' questions.

Issue 11: Whether the trial Court abused its discretion

by foreclosing questioning of Elbert Wiltz and Dellisandrew Wiltz as to Dellisandrew's habit of (and prior convictions for) carrying guns.

At the August 14th incident, Elbert and Dellisandrew pretended that Dellisandrew had a gun; both also testified that Dellisandrew did not actually have a gun. In the lower Court Appellants attempted to introduce evidence that Dellisandrew had a "habit" of carrying a gun. They also tried to introduce evidence that Dellisandrew was convicted previously for carrying a gun. Appellants believed that if they could show Dellisandrew had a gun at the August 14th incident, they would have been more justified to act as they did (keeping Elbert Wiltz in confinement and beating him).

Appellants argue they should have been allowed to

question Elbert as to whether Dellisandrew had a habit of carrying a gun. Evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom. (Cal. Evid. Code Section 1105) Habit in this section is defined as "a regular response to a repeated specific situation". (Law Revision Commission Comment following Section 1105) It does not seem that carrying a gun often is a regular response to a repeated situation within the definition of "habit." Nevertheless, even if it were considered a "habit," Appellants failed to lay a proper foundation before asking whether Dellisandrew had a habit of carrying a gun. Also, whether Dellisandrew actually had a gun was not in issue.

With regard to Dellisandrew's felony record for carrying

a gun, the issue of prior felony conviction has already been dealt with above. Moreover, Appellants are trying to prove specific conduct by use of a felony conviction. Evidence Code Section 788 provides that the felony record of a witness may be introduced "for the purpose of attacking the credibility" of a witness, and not as proof of specific conduct.

Issue 12: Whether the trial Court abused its discretion by denying Defendants/Appellants "discovery" of the address of Realla Wiltz.

Appellants attempted to show at trial that Elbert Wiltz was the aggressor by showing his "violent" character. They wanted Realla Wiltz, Elbert's ex-wife, to testify to the fact that Elbert had previously been arrested in December, 1980 for assaulting Realla with a gun. However, Appellants did not have

Realla's address and attempted to ask Elbert for her address on cross-examination. They stated on the record that the purpose in seeking her address was to subpoena her. The Court allowed the District Attorney to subpoena Realla Wiltz after Elbert stated to the Judge that he feared for Realla's safety.

Appellants argue that it is "reversible error" for not allowing them discovery of her address. They cite Evidence Code Section 1103 which allows evidence of the character of the victim of crime.

The argument is without merit. Appellants wanted Realla's address for the purpose of subpoenaing her. Once the Court allowed Respondent to subpoena her and Respondent so offered, it was no longer necessary for Appellants to obtain her address.

Issue 13: Whether the trial Court abused its discretion by excluding testimony of Steven Pratt (a defense witness).

On direct examination, Appellant Stevens testified that the Wiltz brothers "yelled abuse" at the Appellants for at least 20 minutes while they were at the police station. On cross-examination, Stevens testified that the Wiltzes insulted Appellants, threatened them, and argued about them. Appellants attempted to call Steven Pratt as their witness. Mr. Pratt was in custody on the same night as Appellants and he allegedly heard and saw what transpired between the Wiltz brothers and Appellants at the police station. Mr. Pratt's testimony was introduced to corroborate Appellant Stevens' earlier testimony and to show that Elbert Wiltz had a propensity for violence. The Court excluded Pratt's testimony on several grounds:

"First of all, it's not relevant, secondly, it would be hearsay; thirdly, it's not part of the res geste (sic). It's outside of the res geste (sic), and lastly, that even if it was relevant, that it is, in the Court's opinion, so remote after the fact that I think that I would be --- well, be discretionary, and should be excluded under 352, and I don't have to go that far because there are legal grounds."

Appellants argue the Court should have allowed Pratt to testify both to corroborate Stevens' testimony and to show Wiltz's violent character.

Appellants' arguments are without merit, First, there was no need to corroborate Stevens' testimony. There was no testimony or other evidence contradictory or even questioning what Stevens said regarding threats/abuse at the police station. The testimony on cross-examination actually helped

Appellants' case. Stevens' testimony stood uncontradicted before the jury. Thus, Pratt's testimony was irrelevant.

Second, Appellants correctly point out that evidence of a character trait of the victim is admissible if offered by the Defendant to prove conduct of the victim in conformity with such character. Cal. Evid. Code Section 1103(a)(1) Also, the evidence may be of the victim's subsequent acts of violence (subsequent to the crime for which the Defendant is on trial). People v. Shoemaker (1982) 135 Cal.App.3d 442, 448. However, the testimony offered by Appellants (what Wiltz may have said to Appellants) would have been hearsay. Moreover, verbal threats by themselves did not tend to show Wiltz's propensity for violence. Also, as mentioned above, Stevens had already given uncontradicted testimony regarding the alleged threats.

There were more reasons for excluding the testimony than for allowing it. The trial Court did not abuse its discretion in excluding Pratt's testimony.

Issue 14: Whether the trial Court erred in qualifying Sgt. Pera as an expert witness and in allowing certain questions to be asked of him.

Sgt. Pera was called as a witness to the August 14th incident and as an expert witness regarding when firearms may be used. Appellants argue that Pera was qualified as an expert on when firearms may be used by police officers, but not on when firearms may be used by citizens. Pera's expert testimony related to Larry Weissman's charge of violating Penal Code Section 12031, carrying a loaded firearm in a public place or street. (August 26th incident) The People intended to show

that it was unreasonable for Weissman to respond to the whistle and crowd by carrying a firearm with him (assuming he was in the house when the whistle was blown.)

On voir dire, Appellant Stevens asked Sgt. Pera whether he had received training in the use of deadly force by anyone other than police officers, to which he responded "yes." Pera was then asked if he had received training in the use of deadly force by citizens, to which he responded, "no."

After Pera's qualifications were examined at length, by both parties, the Court stated (in response to an objection by Appellants):

> "The Court is convinced that he is an expert on the use of firearms by training, training both on the job, training -- academic training as to 15 years in the police department, and that he is a qualified person to testify as to the use

of firearms by any person not merely limited to a police officer."

Pera was later asked hypothetical questions as to when it is proper for a citizen to use a firearm. Particularly, Pera was given as hypothetical facts the situation which arose on August 26th. Pera testified that in his opinion, responding to a whistle, not having ascertained what was going on, would not constitute grave and immediate danger necessitating the use of a firearm. Further, Pera testified that a factor for determining the necessity would be a situation which involved life-threatening weapons. Appellant Stevens made continuing objections to the above questions, including the objection that Sgt. Pera was arguing the law.

Evidence Code Section 720(a) provides in part:

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training or education sufficient to qualify him as an expert on the subject to which his testimony relates."

Although a trial Court is given wide latitude in determining the qualifications of an expert, (People v. Kelly (1976) 17 Cal.3d 24, 39) we agree with Appellant Stevens that the testimony of Sgt. Pera did not constitute a proper subject for expert opinion. Given all of the evidence offered on the subject, however, and the Court's instructions, the error in admitting Sgt. Pera's opinions was harmless. In addition, it should be noted that Appellant Weissman, the only Defendant against whom the evidence was offered, failed to object.

Issue 15: Whether the trial Court abused its discre-

tion in sustaining an objection to questions regarding Officer Geraty's "bias" against Appellant Weissman.

Apparently, Officer Geraty originally arrested Weissman for two felony violations, Penal Code Section 12025(b) (ex-felon carrying concealed weapon) and Penal Code Section 12021(a) (possession of firearm by ex-felon). Appellant Weissman was actually not an ex-felon. Weissman was eventually charged with the misdemeanor violations for which he was on trial. Appellants believe that Officer Geraty intentionally imposed false charges on Weissman and that Geraty's doing so would show Geraty's bias against Weissman.

During the trial, Weissman asked Geraty on cross-exam whether Geraty had booked him (originally) on felony charges. Geraty said he was advised by the supervising sergeant that

Weissman had prior felony convictions. Weissman also asked if Geraty attempted to run a computer records check, to which Geraty responded yes. Weissman then asked, "were there any felony convictions on that record." Respondent objected. The objection was sustained on two grounds: hearsay and relevance.

Appellants argue they should have been allowed an answer to that question. They contend the question sought to prove Geraty's bias. Since questions which tend to show bias are proper cross-examination, the witness should have been allowed to answer.

Appellants' argument is problematic. Even if the answer to the above question would have been "no" (indicating Weissman was not an ex-felon), it is difficult to see how a negative answer in and of itself would have shown Geraty's bias.

(Geraty testified his supervisor indicated to him that Weissman was an ex-felon.) Moreover, the booking of Weissman as a felon was not relevant as to the then current misdemeanor charges.

The hearsay objection was also properly sustained. A 'yes' or 'no' answer to the question as framed would have established whether there were any felony convictions on the record. The answer went to the truth of the matter asserted and thus would have been hearsay. (Appellants did not present any hearsay exceptions.)

Issue 16: Whether the trial Court erred in denying Appellants' motion to review the District Attorney's cross-examination questions (of Appellants' character witnesses) outside the presence of the jury per People v. Eli.

Prior to presenting their case, Appellants moved the

Court to review (out of the presence of the jury) the cross-examination questions which the D.A. intended to ask of Appellants' character witnesses. The motion was made pursuant to People v. Eli (1967) 66 Cal.2d 63. The Court denied the motion primarily on the grounds that reviewing the D.A.'s questions would unduly delay the trial. With four Defendants and several character witnesses, having to go into chambers and examine the D.A.'s questions each time would delay the jury. Also, the Court felt at that time it would be prejudicial to force the D.A. to make up a list of questions and be held to them. The D.A. would not know the questions he'd ask until hearing their testimony.

Appellants point out several times where the denial of this Eli motion was "prejudicial" to them. Some of their ob-

jections were either not valid or were sustained by the Court and need not be examined. A couple of incidents are worth mentioning. On one occasion the character witness was asked by the D.A. if he heard that Mr. Weissman was arrested for assault with a deadly weapon on a peace officer in December, 1980. Appellant Weissman asked for an offer of proof. The D.A. walked over to Weissman with a piece of paper. Appellant Stevens objected that the question was asked in bad faith. The Court stated it was not in bad faith as the D.A. was reading from a "public printout." (Appellants' rap sheet, of which Appellants apparently had copies) The objection was overruled. Appellants believed the charge asked about above was false. The Court stated that the D.A. was entitled to rely on official records.

Later, the D.A. asked another character witness whether he had heard that Weissman was arrested for assault with a deadly weapon on a police officer in December, 1980. Weissman then said there had been a mistake in that the charge was Penal Code Section 245(a), assault with a deadly weapon on a private citizen. The Court then required the D.A. to limit the question.

Appellants argue these "groundless" questions were asked as a result of the questions not being previously reviewed by the Court.

When a criminal Defendant presents opinion or reputation evidence on his own behalf, the prosecutor may present like evidence to rebut the Defendant's evidence and show a likelihood of guilt. (Evid. Code Section 1102(b).) In People v.

Eli, the Court stated regarding cross-examination of Defendants character witnesses:

> "Counsel must not be permitted to take random shots at a reputation imprudently exposed, or to ask groundless questions 'to waft an unwarranted innuendo into the jury box' (citing Michelson v. U.S. (1948) 335 U.S. 469, 481). To avoid excesses in efforts to destroy or rehabilitate character evidence, trial Courts are invested with discretion to limit the number of witnesses on the subject and to control cross-examination. There is a responsibility on the trial Court to scrupulously prevent cross-examination based on mere fantasy. This may best be done by first ascertaining, outside the presence of the jury, 'that the target of the question was an actual event, which would probably result in some comment among acquaintances if not injury to defendants' reputation.' (citing Michelson at 481)." People v. Eli, supra, at 79.

In Eli, the Court held that failure to adapt this foregoing course was error. However, the Court affirmed the judgment of conviction on the ground that the error was not prejudicial in view of all the evidence. Id. at 80.

The prosecutor must show that the questions are asked in good faith; good faith requires, in addition to factual support for the matters inferred in the question, that the question be asked in anticipation of an affirmative response and not simply for the purpose of getting an innvendo before the jury. People v. Kramer (1968) 259 Cal.App.2d 452, 466-68.

It seems to be within the Court's discretion to choose to review the prosecutor's cross-exam questions. Even if the Court committed error by denying Appellants' Eli motion, the error does not require reversal.

First, the questions asked do not seem to be groundless. It appears the D.A. was asking questions in good faith, since the arrest was read from Appellants' rap sheet. If anything, the problem appears to be a lack of foundation as to the record itself and consequently, the arrest taken therefrom. Assuming the record was valid, there would be factual support for the arrest, and an affirmative response could be anticipated. There is a problem in the fact that later it appears that the arrest for assault on a peace officer was really for assault on a private citizen. However, given the fact that the jury weighs the evidence, it would necessarily take into account the later correction.

Second, in light of all the evidence against Appellants, the Court's failure to review the questions does not appear

prejudicial.

Issue 17: Whether the trial Court erred in excluding testimony as to Appellants' character trait of "lack of racial bias."

Appellants point out places in the trial where prosecution witnesses testified to the effect that Appellants were racists: For example, Elbert Wiltz testified that Appellants used the word "nigger" and that he thought Appellants were members of the ku klux klan. Wiltz also testified:

> "One of the guys was making some kind of comment, racial comments, being a Communist Party, that I was harassing white women in the neighborhood; they were going to fix all these black dudes."

Appellants wanted to call character witnesses as to Appellants' lack of racial bias. The trial Court excluded

character testimony of the trait of lack of racial bias because it was not at issue. At issue was whether Appellants committed battery, assault, false imprisonment and possession of firearms. The Court did permit character evidence as to Appellants' propensity for violence or non-violence.

They argue on appeal that they should have been able to introduce such character evidence under Evidence Code Section 1102(a). Under this section, the accused in a criminal case may introduce evidence of his good character to show his innocence of an alleged crime, provided that the character trait is relevant to the charge made against him. People v. Qui Mei Lee (1975) 48 Cal.App.3d 516, 526.

The Court properly excluded character evidence of Appellants' trait for lack of racial bias. Racial bias was not

relevant to the charges. Moreover, Appellants could have rebutted any testimony relating to racist remarks by testifying that they did not make racist remarks to Elbert Wiltz, for example. The trial Court was not in error.

Issue 18: Whether it was reversible error for the trial Court to refuse to give Defendants' proposed special jury instructions 2, 4 and 9.

Appellants argue it was reversible error for the trial Court to refuse to give the special jury instructions they requested. They contend that the special instructions related to "specific evidence that pinpointed legal theories upon which the defense was based."

"It is elementary, requiring no citation of authority, that instructions must be reviewed as a whole and in light of

the other instructions given by the Court to the jury." People v. Coleman (1979) 89 Cal.App.3d 312, 322; People v. Russell (1971) 22 Cal.App.3d 330, 336. In determining whether error has been committed by a Court in giving or not giving a jury instruction, it must be assumed that the jurors are intelligent persons and capable of understanding and correlating all jury instruction given. People v. Coleman, supra, at 323. It is not error to refuse to give an instruction which is an incorrect statement of the law. People v. Franco (1970) 4 Cal.App.3d 535, 542.

Special Instruction No. 2 read:

> "If the evidence raises a reasonable doubt in your minds as to whether or not Defendants, using reasonable force, acted in self-defense or defense of another on August 26, 1982, then they have met their

burden to prove the lawfulness of the force used on Troy Christensen and cannot be found guilty of battery."

Appellants argue that there was conflicting testimony regarding the amount of force allowable in the situation with Troy Christensen and that no instruction addressed the quantity of proof necessary to acquit Appellants. However, this instruction is cumulative. The Court gave an extensive instruction to the jury on the law of self-defense and defense of others, as well as one on reasonable doubt. Appellants point out no reason which would require the use of these words. The instructions as a whole relating to the self-defense/defense of others issue fully and fairly informed the jury as to the law. Even though the instructions were not all read together, i.e. reasonable doubt standard along with the self-defense rules, it

must be assumed that the jury is capable of correlating all instructions given. People v. Coleman, supra, at 323. The Court was not in error in refusing to give this instruction.

Special Instruction No. 4 read:

> "Defendants Stevens, Hueston and Landberg are each charged with a false imprisonment of Elbert Wiltz. The offense of false imprisonment consists of two elements, the violation of another's liberty, and the unlawfulness of such violation. Imprisonment consisting merely of a lawful arrest is not false imprisonment. In this case, Defendants have raised the defense that the violation of Elbert Wiltz's personal liberty was lawful and pursuant to their arrest of him for committing the public offense of assault. The burden of proof required of Defendants to prove the lawfulness of the imprisonment can be met by evidence which produces a reasonable doubt in your minds as to whether or not Elbert Wiltz did in fact attempt to punch Tom Stevens."

Appellants admit there was no dispute that they actually restrained Elbert Wiltz. They intended to show that the restraint was lawful, and wanted to clarify that they needed to raise only a reasonable doubt as to the lawfulness/unlawfulness of their actions. Appellants argue no other instruction addressed this issue.

Special Instruction No. 4 is cumulative, ambiguous, and to a certain extent misstates the law. The Court instructed the jury on the element of false imprisonment. The Court also instructed the jury that a person may arrest another for an offense committed in his presence and may restrain that person. The last sentence regarding the burden of proof is ambiguous and would mislead the jury. If the sentence were interpreted to provide the reasonable doubt standard, the instruction was

already given. The Court properly excluded this instruction.

Special Instruction No. 9 read:

> "As I have instructed you, an act committed under a mistake of fact which disproves any criminal intent is not a crime. Defendant Weissman is not guilty of a crime if he heard a whistle and armed himself with a loaded firearm and went into a public place with it under the honest and reasonable belief that a person was in immediate, grave danger necessitating the carrying of such weapon to preserve that person whether or not such belief was true."

This instruction relates to Appellants' "defense" that the whistle meant danger and that Weissman would then be allowed to respond to that danger by carrying a gun. The instruction misstates the law to the extent that it implies a person may always carry a gun lawfully in response to a whistle. It assumes that the jury has already decided it was

reasonable to respond to the whistle by carrying a gun. Thus, the instruction is misleading. The jury must decide whether Weissman reasonably believed a person was in immediate grave danger and that the carrying of such weapon was necessary to preserve that person (an instruction which was read to the jury.) The instruction which was read was proper (P.C. 12031(j)) and it fully informed the jury. The Court properly refused instruction no. 9.

Issue 19: Whether the trial Court erred in denying Appellants' motion for a continuance on the motion for a new trial and in refusing to admit newly discovered evidence at the hearing.

Appellants were scheduled to be sentenced on July 29, 1983. They filed a motion for a new trial which was scheduled

to be heard on the same date. The motion was made on many of the same grounds as this appeal.

On July 28th, a day before the hearing, Appellants allegedly received a package of information from the District Attorney's Office. One of the documents was a copy of a three-page unsigned statement of Troy Christensen (the "victim" of the August 26th incident). In the statement, Christensen basically indicated that he was the initiator (in the August 26th incident), in that he grabbed Stevens before Stevens "had a chance to do any more damage to the car . . ." Apparently, Appellants had never seen this statement before.

At the hearing on the motion for a new trial, Appellants brought to the Court's attention they had this new evidence. The Court indicated it was not prepared to hear a new trial

motion based on new evidence. Appellant Weissman asked the Court for a continuance so that Appellants could prepare affidavits and/or asked the Court to hear it right then in conjunction with the other new trial motion. The Court indicated that it would take the original new trial motion under submission but that it would deny the new evidence motion without prejudice. The Court did not want to hear the new motion on nothing more than the oral statement of Appellants.

There was some discussion as to the last date which a new trial motion could be made. Penal Code Section 1182 requires that an application for a new trial must be made and determined before judgment (and thus sentencing). Appellants were concerned that sentencing would occur on that date, July 29, 1983 without their motion for new trial-new evidence being

heard. The Court indicated on the record that Appellants made their motion for a new trial, that the motion was denied without prejudice and that Appellants could bring it up at a later date.

Appellants were allowed to file a new trial motion based on new evidence later. However, Appellants never filed another motion. Since Appellants never again presented the new evidence, Appellants cannot complain about the evidence not being considered. Appellants argue that the continuance should have been granted under Penal Code Section 1181(8), the new evidence section. Under this section, the Court may postpone the hearing if time is required by the Defendant to procure affidavits. Thus it is within the Court's discretion. People v. Yeager (1924) 194 Cal. 452, 491.

It was not an abuse of the Court's discretion to have denied the continuances, especially where nothing had been submitted by Appellants other than the oral statement made by them. Also, even if the new evidence had been considered by the Court, the new trial motion most likely would have been denied. Christensen's statement merely would have impeached or discredited Markley's testimony, a ground which does not compel the granting of a new trial. People v. Moten (1962) 207 Cal.App.2d 692, 698. The trial Court was not in error.

Issue 20: Whether there were acts of judicial misconduct throughout the trial, and if so, whether the acts constitute reversible error.

Appellants point out several instances during the trial which they argue amounted to judicial misconduct. Many of the

instances seem to arise out of the fact that Appellants represented themselves and did not have a legal education behind them.

Approximately half of the instances occurred during Appellant Stevens' opening statement. Appellants mention nine "interruptions" which they cite as judicial midconduct. They contend that these instances are not by themselves abuses of discretion; however, "taken on comparison with the indulgence shown to the prosecution during his opening statement, they reveal partiality." (Appellants' Opening Brief.)

Several of the instances arose out of Stevens' attempt to go beyond the scope of the opening statement. A few times, Stevens appeared to be arguing his case and not pointing out what the evidence will show. (For example, at one point,

Stevens said, "And in the eyes of the D.A., if a fight happens, the White Panthers should be arrested." On these occasions, the Court sustained the prosecutor's objections (that Stevens was arguing or going beyond the scope of an opening statement). The Court instructed Stevens not to argue the case during his opening statement and also instructed him as to the purpose of any opening statement. Appellants believed the Court, by sustaining the prosecutor's objections and by instructing them, was "disparaging their legal understanding" and "demonstrating to the jury that the Court and prosecutor were privy to special knowledge of the rules of procedure which Defendants were ignorant of."

A couple of the other instances involved Stevens' speculation as to which witnesses will be called or permitted to be

called. For example, Stevens said he was uncertain whether the D.A. intended to call Dellisandrew Wiltz and then proceeded to discuss who Dellisandrew was. The Court indicated that Stevens could not speculate as to who the prosecution will call or what the prosecution's witnesses will testify to.

As mentioned above, Appellants argue these incidents reveal partiality to the prosecutor and against Appellants. However, in each of the examples, the Court properly sustained the prosecutor's objections. It is the duty of the trial Judge to control all proceedings during trial and to limit the introduction of evidence and argument of counsel to relevant and material matters. Cal. Penal Code Section 1044. As reiterated in Williams v. Goodman (1963) 214 Cal.App.2d 856, 869, the purpose of an opening statement is:

"to inform the jury in a general way
of the nature of the action and defense,
to advise them of the facts relied on
by the party to make up his right of
action or defense, to define the nature
of the questions involved, and advise them
of the issues to be tried and the facts
intended to be proved so as to enable
them to understand the case to be tried;
and the opening statement is not for the
purpose of discussing questions of law."
(citing 88 Corpus Juris Secundum, Trial
Section 661, p. 314)

In the examples noted by Appellants, Stevens was going beyond the proper scope of an opening statement by arguing and speculating. It was the Court's duty to sustain the objections and to guide Appellants so that only relevant material is presented and the opening statement is properly done.

Appellants also point out instances later in the trial which they argue were unfair. A few of the instances have

already been discussed in preceding issues.

A couple of the instances involved Stevens' cross-examination of Elbert Wiltz. In the first instance, Stevens was going from subject to subject in his questions. The Court advised him that he should keep his questions in sequence and the he should not jump from subject to subject. In the second instance Stevens had asked Wiltz the same question over and over again. The prosecutor objected and the Court stated, "This has been beaten to death." The Court then explained what the witness had stated and cautioned both Stevens and Wiltz not to argue with each other.

These instances do not seem to amount to acts of misconduct. "The trial Court has discretionary power over cross-examination which will be disturbed on appeal only in case of

an abuse thereof; the Court may confine an examination within reasonable limits and may curtail a cross-examination which is unduly protracted, frivolous, or which relates to matters which are irrelevant, admitted or have already been fully covered. People v. Ross (1969) 276 C.A.2d 729, 734. It was within the trial Court's discretion to guide Stevens in his cross-examination and to admonish Stevens for arguing.

The other few incidents involve comments by the Court to Appellants. One involved the examination of Sgt. Pera. As mentioned in a prior issue, he was testifying as an expert. Appellants requested that he be voir dired. The Court responded that Appellants had the right to voir dire him, but, "he is a police officer, sergeant for 15 years, received training, and it's strange that you would want to lay a further

foundation." On another occasion, Stevens and Judge Desmond were discussing how long Stevens expected for cross-exam. Stevens said it would probably take an hour or hour and a half. The Court responded, "On a 20-minute direct -hour or hour and a half?" Mr. Stevens then said, "crossexamination always takes longer than direct; you know that." The Court then said, "Not when I was doing it."

Appellants argue they were improperly criticized by the Court. Although the relationship between the Court and Appellants was somewhat strained, (it was a long trial), nothing was said or done by the Court which would amount to judicial misconduct. (Compare People v. Mahoney (1927) 201 Cal. 618).

Issue 21: Whether there were acts of prosecutorial

misconduct throughout the trial, and if so, whether the acts constitute reversible error.

"As the representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law. Hence, a prosecutor's duty is more comprehensive than a simple obligation to press for conviction. People v. Kelley (1977) 75 Cal.App.3d 672, 680. The United States Supreme Court in Berger v. United States (1935) 295 U.S. 78, 88 stated regarding a prosecutor's duty:

> "(The Prosecutor) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecu-

> tion is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In essence, a prosecutor is subject to a higher standard of behavior than defense counsel, given a prosecutor's dual role. See People v. Kelley, supra at 688-690.

Appellants point out thirty-six instances which they argue amounted to misconduct by the Assistant District Attorney, Alan Lipton.

The first group of instances involves the prosecutor's attempts to get a witness, particularly a Defendants' character witness, to answer his questions. On a few occasions, the prosecutor instructed the witness that the prosecutor will ask the questions and the witness will answer; or, the prosecutor asked the witness to respond to his questions. During one instance, the prosecutor harassed a witness regarding the manner in which the witness was answering the questions. In response, the Court struck the prosecutor's comments, admonished the jury and advised Mr. Lipton to refrain. A couple of times Mr. Lipton commented on the witnesses' answering or not answering (e.g. that the witness was taking a long time to answer). Both times the Court seemed to neutralize the prosecutor's comments by guiding the witness or commenting on

the prosecutor's questions.

The second group involves comments made by the prosecutor to Defendants' character witnesses which were either harassing or rude. For example, the prosecutor, while crossexamining Willie Dunkley, exclaimed (the transcript has exclamation points following his questions) "You have never gotten into a fight with Mr. Stevens -- no!" The prosecutor asked a couple times and also asked about Mr. Weissman. After objection by Appellants, the Court struck the prosecutor's answers (no!) from the record, admonished the jury to ignore Mr. Lipton's answers and demeanor and admonished Mr. Lipton "very forcefully." Mr. Lipton then apologized to the Court, witness and jury. Other comments were directed to witnesses in particular. The prosecutor asked a witness to tell him the

names of people so he could call them in and see if the witness was telling the truth. He told a witness to listen to the question and "You can't just get up and ramble"; he asked an officer who had testified before, "And you still have to be educated as to the procedure, going back and forth?" After the last example, the Court objected on its own and asked the prosecutor to stop.

The third group of instances involve outbursts or displays of emotion by the prosecutor. The most severe involved a situation during which Appellants were attempting to introduce some evidence. The prosecutor asked to conduct the discussion outside the presence of the jury and said the evidence wasn't going to come in anyway. Then the Court said it wasn't too sure about that. Subsequently, the prosecutor

pounded the bench as he walked by. Mr. Stevens added that the record should reflect as such. Mr. Lipton then said he would like to pound Mr. Stevens. Mr. Lipton thereafter respectfully apologized. At other times, the prosecutor raised his voice or stood up from a seated position (and was asked by the Court to keep it down or to sit down). In one of these instances, the Court even expressed its own frustration with the witnesses' answer or lack of same. Finally, the prosecutor shook his head when he got an adverse ruling regarding an objection. He was advised by the Court to refrain from doing so.

The fourth category involved what Appellants consider outbursts; however, they are not apparent from the transcript. For example, the transcript indicates the Court advised Mr. Lipton to relax. Appellants argue that the prosecutor's tone

of voice and emotional outbursts are not apparent, but may be inferred from the Court's comments.

The fifth category involves comments by the prosecutor to Appellants or about them implicitly, during the trial. For example, during one instance, Mr. Stevens asked the Court to remind Mr. Lipton not to stand in "the area where he before made threats" (as per the Court's order). The Court asked Mr. Lipton to sit down. Apparently, there was laughter on the jury as Mr. Lipton asked if the record could reflect such laughter. Appellants argue that Mr. Lipton created an atmosphere in which they appeared "laughable" merely because they endeavored to keep the prosecutor within the Court's order. Other comments by Mr. Lipton falling into this category were: "If counsel were a member of the bar -- this is blatant misconduct."

"And they (Appellants) basically sue every cop that's ever come in contact with you, don't they."; also regarding Appellants' alleged suits against the police, "One of them (cases) involves pretty much most of the police at Park Station, doesn't it?

The final category of "misconduct" instances involves comments made by Mr. Lipton regarding Appellants, but which were made outside the presence of the jury. For example, with regard to Appellants ability to ask about felony convictions, Mr. Stevens indicated they "didn't realize you couldn't ask that." Mr. Lipton responded, "This is the third or fourth time over this; how can you be so dense?" The Court asked both counsel to stop. On another occasion, the Court, Mr. Lipton and Appellants were discussing what type of evidence could be brought in on rebuttal. The following conversation took

place:

> MR. STEVENS: Rebuttal can only be used to rebut things we bring up, can't be used to bring up new matter or else we will never get a chance to respond. That rule is often breached, and I would like not to see a long rebuttal. It's breached frequently, and that would be a violation.
> MR. LIPTON: I have shown these uneducated people due respect throughout the course of the trial.
> I have been a prosecutor for a particularly long period of time.
> THE COURT: That is what I want to avoid.
> MR. LIPTON: I don't -- don't want to be told about rebuttal by a person who never went to law school.

While the prosecutor should have been more courteous to Appellants and should have refrained from his comments, this category of comments could not have prejudiced Appellants' case, as the comments occurred outside the presence of the

jury. Even if the comments amounted to prosecutorial misconduct, a result more favorable to Appellants would not have resulted had the prosecutor refrained. Thus, this category could not result in reversal. (See People v. Kelley, supra, and People v. Prysock, supra.)

Prosecutorial misconduct implies a dishonest act or an attempt to persuade the Court or jury, by use of deceptive or reprehensible methods. People v. Gillian (1974) 41 Cal.App.3d 181, 194. In looking at all of the instances cited by Appellants, it is clear there were times when the prosecutor should have held back his temper and refrained from unnecessary comments. The prosecutor's comments may not have been the best choice of words; however, none rose to the level of misconduct constituting a deceptive attempt to persuade the

jury. Moreover, it is equally clear from the entire transcript that the trial involved an emotionally charged atmosphere as a result of the conduct of all parties concerned. The trial Judge showed a good deal of patience and did his best to neutralize the rivalries involved. On several occasions, the Court sustained objections, or even objected on its own, to the prosecutor's comments or acts; the Court also admonished the jury and cautioned the prosecution. It can be argued that sustaining objections and admonishing the jury after each instance may not be a sufficient remedy in light of the influence a combination of the instances may have on the jury. However, the jury had to endure a long trial. They were well aware of the rivalries and emotions between the parties.

Even if the prosecutor's comments and actions were held

to be misconduct, reversal would only be warranted if the misconduct prejudiced Appellants' case. It is unlikely here that a result more favorable to Appellants would have resulted had the prosecutor refrained. The evidence against Appellants was substantial on the charges for which Appellants were convicted.

Conclusion

We have reviewed the entire record furnished to us and conclude that the evidence of Appellants' guilt can reasonably be described as strong. Upon our review, we are of the opinion that it is not reasonably probable that a result more favorable to the Appellants would have occurred in the absence of any error.

The Judgments are affirmed.

DATED: August 26, 1985

LUCY KELLY McCABE
Presiding Judge of the Appellate Division of the Superior Court

MAXINE MACKLER CHESNEY
Judge of the Appellate Division of the Superior Court

MORTON R. COLVIN
Judge of the Appellate Division of the Superior Court

1/ The crimes charged in this case occurred subsequent to the passage of "Proposition 8" on June 8, 1982. There was no discussion in the trial court of the effect, if any, of the addition of Article 1, Section 28 to the State's Constitution. In any event, the trial court arguably applied the correct standard as set forth in People v. Castro (1985) 38 Cal.3d 301.

RULINGS ON DEMURRERS

No written order or reporter's transcript is available. Demurrers were overruled on October 21, 1982 by Judge Roy Wonder, Municipal Court of San Francisco, State of California.

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA

---o0o---

THE HON. INA LEVIN GYEMANT, JUDGE

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,	DEPARTMENT NO. 17
-vs-	
THOMAS WILLIAM STEVENS,	Court No. 536093 O 011470/A 242,236PC
RONALD IAN LANDBERG,	Court No. 538642 O 0124984 242 PC Court No. 538640 O 0124973 242 PC
LARRY A. WEISSMAN,	Court No. 536095 O 111592/A 242,236PC
JEFFREY PAUL HUESTON,	Court No. 538321 K 69354-7A 12031, 12025, 242, 415.1 PC Court No. 536094 O 111581/A 242, 236PC
Defendants.	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

RULING ON MOTION TO SUPPRESS

25 January, 1983

---o0o---

APPEARANCES:

For the People: THE HON. ARLO SMITH
District Attorney
By MR. LAWRENCE MURRAY
MR. WILLIAM HICKEY
MR. ALAN R. LIPTON
Assistant District Attorneys

For the Defendants: IN PROPRIA PERSONA

25 JANUARY, 1983

---oOo---

(The following proceedings are to be inserted in the Reporter's Transcript of Proceedings prepared on 5 September, 1983, at page 138, 17th line)

THE COURT: In the matter of the People versus Stevens, Weissman, Jeff Hueston, Ronald Landberg and Mark Simmonovski:

It is my ruling that, under the Federal Law or the State Law, that the seizure of the gun, and the People, are to be upheld.

It appears to me that the police officer had a right to rely on the citizens' information of a fight; and on the citizens who signed the citizen's arrest;

And, therefor, the arrest was lawful; and

The search incident to the lawful arrest was proper.

I find that the pipe was in plain view, and was properly seized as possible evidence.

Defendants' cases, which I have read, are not in opposition to this holding.

The two cases regarding the citizen's arrest form were civil cases involving false imprisonment and false arrest; and did not stand for the proposition that if a citizen did not come in -- and we did not have that evidence -- but, if the citizen did not come in and sign after signing a citizen's arrest, that the remedy would be a suppression of the evidence.

So the motion to suppress the evidence is denied.

MR. STEVENS: Thank you, Your Honor.

---o0o---

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA

---o8o---

COPY

JUDGE

THE HON. INA LEVIN GYEMANT,

- - - - - - - - - - - - - - - - - - - -

THE PEOPLE OF THE STATE OF CALIFORNIA)

PLAINTIFF,)

-vs-)

THOMAS WILLIAM STEVENS,)

RONALD IAN LANDBERG,)

LARRY A. WEISSMAN,)

JEFFREY PAUL HUESTON,)

DEFENDANTS.)

DEPARTMENT NO 17

Court No. 536093
O 811478/A 242, 236 PC
Court No. 538642
O 8124984 242 PC
Court No. 538640
O 8124973 242 PC
Court No. 536095
O 111592/A 242, 236 PC
Court No. 538321
K 69354-7A, 12031, 12025
242, 415.1 PC
Court No. 536094
O 111581/A 242, 236 PC

- -

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARINGS

JANUARY 11, 25, 1983
FEBRUARY 23, 1983
MAY 3, 5, 1983

---000---

APPEARANCES:

For the People — THE HON. ARLO SMITH
District Attorney
By: MR. LAWRENCE MURRAY
MR. WILLIAM HICKEY
MR. ALAN R. LIPTON
Assistant District Attorneys

For the Defendants — IN PROPRIA PERSONA

Reported by: — Jerry M. Matsukado, CSR # 5251
Official Court Reporter

INDEX TO DATES

11 January, 1983	1
25 January, 1983	82
23 February, 1983	163
3 May, 1983	181
5 May, 1983	205

INDEX TO WITNESSES

For the Defense:	Dir.	Cr.	Redir.	Recr.
JOHN CLAYTON GERATY				
By Mr. Weissman	95		112	
By Mr. Murray		97		

INDEX TO EXHIBITS

For the People		I.D.	Evid.
1	Conduit	98	125
2	Evidence Envelope	98	125
2A	.38 Smith & Wesson	110	125
2B	Holster	110	125
2C	Envelope	110	125
2D	.38 Cal. Bullets	110	125

For the Defense
For the Motion to Suppress

A	Citizens arrest card	128	128

For the Murghia Motion

A	Affidavits	149
B	Motion to Suppress	149
C	Complaint	149
D	Complaint	149
E	Disposition Record	149
F	Memorandum	149
G	Petition	150
H	Transcript	150
I	Examiner article copy	150
J	Examiner article copy	150

Exhibits C, D, and E, are uncertified complaints against two people with no connection being made to the White Panthers as to one of the people that's represented in the complaint; and there's no evidence of disposition, or even as to the filing of the complaints.

The uncertified affidavits which, if the Court could consider, they allege arrests and dismissals of various charges. They're not the same as the various charges that are involved here on all of these charges, took place some eight to ten -- eight or nine or ten years ago.

MR. STEVENS: That's not true ---

THE COURT: Just a minute, counsel.

There's an unsubstantiated allegation of a case in 1981 which was allegedly dismissed; and thre is a further

allusion to a case of a conviction and a prison sentence being served by these same defendants.

Exhibits H and I are unverified and unsubstantiated transcripts. Assuming that they are authentic, as the district attorney has stipulated, they are of a 1978 television program concerning citizen complaints about the White Panther Party, with a newscaster's conclusion that the district attorney will be investigating.

Exhibit G is a petition from 1978 by citizens seeking to limit the activity of the White Panthers in the Haight-Ashbury district.

Now, assuming that these documents do establish a class, and that there would be an unjustified motive by the prosecution -- although the Court does not believe that that is

established by those documents --

Assuming that it is: The defendants have not proven, by competent evidence, or by any evidence, the second burden: And, that is, that they have been singled out for prosecution and that others similarly situated have not generally been proceeded against because of conduct of the same type forming the basis of these charges.

In contrast, in the case of People v. Municipal Court, Street, 89 Cal.App.3d., 739, page 744, the Court gives an indication of the type of evidence which establishes a prima facie showing.

The Municipal Court in Street found that there was sufficient showing to require discovery of, "Any documents and any policies that might be reflected in documents, so that

this court can be assured that justice is being dispensed with an even-hand."

And this is also this court's concern, that justice be dispensed with an even hand.

But the Court finds that the district attorney's declaration under oath compels this court to the conclusion that the defendants have not met their burden of proof.

And the motion will be denied.

MR. STEVENS: Well, Your Honor, we don't argue with the Court after you made your ruling.

Just to keep the record clear, the stipulation as to authenticity went to the very precise question of the necessity of signing documents and everything like that. So, those documents, unless the Court rejects the stipulation---

THE COURT: I understand that.

MR. STEVENS: I mean, they should be regarded as precisely authentic -- no problem getting them signed -- but it just seemed like an unnecessary step to retract, and then resubmit, them.

On the other point, if the people who assaulted are -- aren't similarly situated, then I don't know how you define the concept. They, rather obviously, are similarly situated; and, yet, they're not prosecuted or the people that attack us don't get prosecuted and we do.

You found that's not discriminatory. We accept the ruling.

MR. HICKEY: Your Honor, before we leave this -- with regard to the felony convictions of the victims, if Mr. Stevens

would submit a request, and if he cares to, with any -- although he's not required to -- with any information he has, we would be glad to comply with the court's standing order of discovery in that regard.

MR. STEVENS: We plan to move for contempt sanctions.

Courts rarely hold the district attorney in contempt; but this was so clear and so obvious a violation that we'll put it before a court and see what the court does on that one.

But it will all be subsequent. And, in the meantime, we'd appreciate the district attorney obtaining any evidence about convictions in jurisdictions other than San Francisco.

THE COURT: All right.

Well, I would only tell them there is a standing order of discovery, and that you would be required to comply

SUPERIOR COURT OF THE STATE
OF CALIFORNIA

FOR THE CITY AND COUNTY OF
SAN FRANCISCO

APPELLATE DEPARTMENT

App. Dept. Action No. CR 3308, 3309,
3310, 3311, 3312, 3313, Mun.
Court Action No. 538642, 538640,
538321, 536094, 536095, 536093

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

-vs-

THOMAS W. STEVENS, RONALD LANDBERG,
JEFFREY P. HUESTON, LARRY A. WEISSMAN,

Defendants and Appellants.

Judgment
On Appeal From the
Municipal Court
of the City and County
of San Francisco
State of California.

This cause having been argued and submitted, and all and singular the law and the premises having been fully considered the Court now renders its decision, that there is no error in the record prejudicial to the appellant. (Memorandum of Opinion attached.)

WHEREFORE it is ordered, adjudged and decreed by the Court that the Judgment of Conviction made and entered in the Municipal Court of the City and County of San Francisco, State of Californa, in the above

entitled cause be and the same is hereby affirmed.

Dated: August 26, 1985

/s/
Lucy Kelly McCABE,
Presiding Judge

/s/
Maxine Mackler CHESNEY,
Judge

/s/
Morton R. COLVIN,
Judge

In the Superior Court of the State of California

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

APPELLATE DEPARTMENT

App. Dept. Action No. CR-3308, 3309, 3310, 3311, 3312, 3313; Mun. Court Action No. 538642, 538640, 538321, 536094, 536093, 536093

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff, and Respondent,

vs.

THOMAS W. STEVENS, RONALD LANDBERG JEFFREY P. HUESTON, LARRY A. WEISSMAN,

Defendants, and Appellants.

ORDER IN RE:

PETITION FOR REHEARING AND APPLICATION FOR CERTIFICATION TO COURT OF APPEALS

ENDORSED
FILED
San Francisco County Superior Court

OCT 29 1985

DONALD W. DICKINSON, Clerk
BY JENNIE TING
Deputy Clerk

158a

Appellant's Petition for Rehearing after judgment in the above entitled cause having been filed on September 10, 1985, and said Petition having been duly considered; it is now ordered that said Petition be denied.

Appellant's Application for Certification to the Court of Appeals in the above entitled cause, having been filed on September 10, 1985, and said Application having been duly considered; it is ordered that said Application is denied.

DATED: OCT 29 1985

LUCY KELLY McCABE, Presiding Judge

MORTON R. COLVIN, Judge

MAXINE M. CHESNEY, Judge

INCIDENT REPORT FORM — SAN FRANCISCO POLICE DEPARTMENT

INCIDENT NO.	INITIAL	CITED	DOMESTIC VIOLENCE	STATEMENT TAKEN?
821897185			NO	NO

TYPE OF INCIDENT	UNIT RPTG.	DATE(S) & TIME(S) OF OCCURRENCE
BATTERY/FISTS, HANDS 3F-4		08/14/82 - 1258 HRS

DATE & TIME REPORTED TO POLICE

08/14/82 1258 HRS

LOCATION OF OCCURRENCE	LOCATION SENT TO	TYPE OF PREMISE
400 BLK COLE ST	SAME	STREET

REPORTING OFFICER/STAR	REPORT APPROVED BY/STAR		HOW CLEARED (RECORD ROOM USE ONLY)
J. SMOOT 535	/s/ Sgt. Blount	907	7

VICTIM CODES: V-VICTIM; R-REPORTEE; W-WITNESS; P-PARENT; N-NOTIFY; F-FOUND; M-MISSING

160a

CODE/NAME(LAST,FIRST,MIDDLE)	RACE	SEX	DOB OR AGE	RES. PHONE
VR WILTZ, ELBERT	N	M	11/14/45	NONE

RESIDENCE ADDRESS

2003 PINE ST

BUSINESS ADDRESS

MUNI BUS DRIVER

OTHER INFORMATION/MISSING PERSON INFOPMATION

TO SEEK OWN MEDICAL FOR COMPLAINT OF PAIN IN NECK AND SHOULDERS

161a

CODE/NAME(LAST,FIRST,MIDDLE)	RACE	SEX	DOB OR AGE	RES. PHONE
W WILTZ, DELISANDREW	N	M	01/28/48	NONE

RESIDENCE ADDRESS

1060-69 AV. OAKLAND

OTHER INFORMATION/MISSING PERSON INFORMATION

BROTHER OF VR E. WILTZ

SUSPECT CODES: A-ADMONISHED; B-BOOKED; C-CITED; D-DETAINED; E-EXONERATED; S-SUSPECT; X-DIVERTED

CODE/NAME(LAST,FIRST,MIDDLE)	RACE	SEX	DOB OR AGE
C-1 STEVENS, THOMAS, WILLIAM	W	M	9/21/44

ADDRESS

1889 OAK ST

WARRANT #/CITATION #	BOOK/CITE SECTION
010111570	242 PC BATTERY

BOOK/CITE APPROVED BY/STAR	I.D.#(SOC.SEC.;OP.LIC;ARMY SER# ETC.)
SGT J. PERA/1925	SF# 250387

CITED TO APPEAR RM. 475, 0800 HRS TUE 9/7/82

1623

BELOW INCLUDE ADDITIONAL HEADING, VICTIMS, SUSPECTS, VEHICLES AND/OR PROPERTY BEFORE BEGINNING NATTATIVE.

SUSPECT CITED C-2 HUESTON, JEFFERY P WM 05/26/62, 1889 OAK ST, CA

D/L C2436663, CITATION 010111581, 242PC BATTERY APPVD BY SGT J. PERA

1925 TO APPEAR RM 475,0800, TUE 9/7/82

163a

SUSPECT CITED C-3 LANDBERG, RONALD IAN WM 03/21/45, 1889 OAK ST, SF

#259639 CITE # 010111592, 242 PC BATTERY, APPVD. SGT J. PERA 1925

TO APPEAR RM, 475, 0800, TUE 09/07/82

INCIDENT REPORT FORM CONTINUATION SAN FRANCISCO POLICE DEPARTMENT

INCIDENT NO.	REPORTING OFFICER/STAR	DATE(S) & TIME(S) OF OCCURRENCE
821897185	SHOOT/535	08/14/82 1258 HRS

WITNESS W-2 BODECKER, TORSTEN W., WM 04/17/55, CA D/L H6879317,

424a COLE ST, 431-2474

OFFICER A. PHILLIPS 645 AND I WENT TO THE 400 BLOCK ON A 405. WHEN WE ARRIVED WE WERE WAVED DOWN BY W1 D. WILTZ IN THE MIDDLE OF THE ST. IN FRONT OF 423 COLE ST. HE POINTED TO A GROUP OF APPROX. 10-12 PEOPLE STANDING ON THE SIDEWALK IFO 423 COLE AND SAID THEY WERE HOLDING HIS BROTHER (VR E. WILTZ) AGAINST HIS WILL. I SAW TWO WM'S STANDING ON THE SIDEWALK IFO 423 COLE HOLDING A LARGE VIDEO CAMERA, POINTING THE CAMERA AT MYSELF AND MY PARTNER, THEN AIMING IT AT VR E. WILTZ, THEN

AT THE SURROUNDING GROUP OF PEOPLE. THERE WAS A WF, 25 YRS, 5'-00", THIN BLD, STANDING ON THE SIDEWALK HOLDING A SMALL PORTABLE TAPE RECORDER IN HER HAND. ON THE GROUND IN THE MIDST OF THIS GROUP WAS VR E. WILTZ, LAYING PRONE ON HIS BACK, WITH C-3 LANDBERG HOLDING HIS FEET, C-1 STEVENS STANDING NEAR HIS HEAD HOLDING ONTO HIS HANDS & ARMS, AND C-2 HUESTON HOLDING WILTZ' NECK IN A ONE-HANDED CHOKEHOLD. APPROX. 4-6 OTHER PEOPLE WERE STANDING AROUND. I ASKED THE CAMERA-MEN IF THEY WERE FROM A NEWS SERVICE (THINKING THEY MAY BE IMPARTIAL WITNESSES) AND THEY SAID NO, WE'RE WITH THEM (INDICATING TOWARD C-1, C-2,C-3), I WENT TO WHERE C-1, C-2, C-3 WERE STILL HOLDING VR E. WILTZ ON THE GROUND AND TOLD THEM TO LET HIM UP. SINCE HE WAS NOT STRUGGLING, AND ASKED C-2 HUESTON WHY HE WAS HOLDING WILTZ ON THE GROUND, SINCE HUESTON APPEARED TO BE IN CHARGE. C-1 STEVENS IMMEDIATELY SHOUTED TO

C-2 HUESTON "DON'T ANSWER ANY QUESTIONS" AND HUESTON IMMEDIATELY THEN SAID "I WON'T ANSWER ANY QUESTIONS". DESPITE BEING ASKED BY ME SEVERAL TIMES WHY HE WAS HOLDING WILTZ, HUESTON NEVER DID ANSWER ANY QUESTIONS, STATING "I WON'T SAY ANYTHING." WHENEVER I TRIED TO SPEAK TO HUESTON, STEVENS WOULD INTERRUPT AND INTERFERE WITH THE QUESTIONING. THE WF WITH THE TAPE RECORDER KEPT FOLLOWING US AROUND, AND ASKING QUESTIONS, AND INTERFERING WITH THE QUESTIONING AND ADDING TO THE CONFUSION, EVEN AFTER WE IDENTIFIED OURSELVES BY STAR NUMBER ON THE TAPE. SHE KEPT TELLING THE C-2 HUESTON ALSO TO NOT ANSWER ANY QUESTIONS. AT THIS POINT I PUT VR E. WILTZ AND W-1 D. WILTZ INTO THE BACK OF THE RADIO CAR, THEN REQUESTED A904 CODE-2 WITH 3F-200 VIA RADIO, WHILE OFFICER PHILLIPS TALKED TO C-1, C-2, C-3 AND THE REST OF THE GROUP. VR E. WILTZ STATED

166a

TO ME THAT HE AND HIS BROTHER WERE WALKING S ON THE E SIDEWALK OF THE 400 BLOCK OF COLE, TOWARD HAIGHT ST, WHEN THEY PASSED A WF, 20 YRS, WHO WAS WALKING ON THE E. SIDEWALK, AND WHO WAS WEARING A PAIR OF RADIO EARPHONES

167a

OVER HER EARS. VR. E. WILTZ ASKED THE WF IF SHE KNEW THE SCORE OF THE GAME (49'ER S/RAIDERS GAME THEN ON THE RADIO). THE WF REPLIED THAT SHE WAS LISTENING TO MUSIC AND DON'T KNOW THE SCORE OF THE GAME, AND BOTH PARTIES CONTINUED ON THEIR WAY. (THIS WF WAS NOT ON THE SCENE WHEN WE ARRIVED, AND WAS UNIDENTIFED BY ALL PARTIES). A FEW SECONDS LATER C-1, C-2, C-3 SUSPECTS GRABBED THE VR E. WILTZ AND THREW HIM TO THE GROUND, THEN DRAGGED THE VR BACK UP THE STRET, AND ACROSS THE STREET, AND HELD HIM ON THE GROUND IFO 423 COLE ST. VR WAS YELLING FOR ANYONE TO CALL THE POLICE.

WITNESS 2 BODECKER STATED TO ME THAT HE HEARD VR E. WILTZ CALLING FOR HELP AND TO CALL THE POLICE, AND THAT HE DID CALL THE POLICE, BUT DID NOT OBSERVE ANY EVENTS PRIOR TO THE CALL FOR HELP.

W-1 D. WILTZ STATED EVENTS THE SAME AS HIS BROTHER, AND FURTHER STATED THAT WHEN C-1, C-2, C-3 GRABBED HIS BROTHER THAT HE, D. WITLZ, RAN AROUND THE CORNER ONTO OAK ST AND CALLED THE POLICE. C-1 STEVENS STATED TO OFFICER PHILLIPS THAT HE HAD SEEN THE WILTZ BROTHERS WALKING AROUND IN GG PARK PANHANDLE NEAR COLE ST, AND THOUGHT "THEY WERE UP TO NO GOOD" SO HE FOLLOWED THEM OVER ONTO COLE ST, WHERE HE SAW VR E. WILTZ SPEAK TO THE WF. C-1 STEVENS STATED HE THOUGHT THE WF APPEARED TO BE DISTURBED BY THE COMMENT, SO C-1, C-2, & C-3 WENT UP TO VR E. WILTZ AND TOLD HIM TO LEAVE THE WOMAN ALONE. A VERBAL ARGUMENT ENSUED, AND C-1, C-2, & C-3 THREW VR. E. WILTZ TO THE GROUND, TOOK HIM TO 423 COLE ST, AND CALLED THE POLICE.

AT THIS TIME, SGT J. PERA 1925, (3F-200) ARRIVED ON THE SCENE AND

INTERVIEWED C-1, C-2, & C-3 AND W-2 D. WILTZ AND VR E. WILTZ, THEN ARRESTED C-1, C-2, C-3 AND REQUESTED A TRANSPORTATION UNIT. C-1, C-2, C-3 WERE TRANSPORTED TO COL F BY OFFICER DUTTO 263, AND WE TRANSPORTED BOTH WILTZS, TO REMOVE ALL PARTIES FROM THE SURROUNDING CONFUSION. CA'S SIGNED BY VR E. WILTZ, C-1, C-2, C-3 CITED AS ABOVE AND RELEASED.

170a

INCIDENT POLICE FORM — SAN FRANCISCO POLICE DEPARTMENT

INCIDENT NO.	INITIAL	BOOKED CITED	DOMESTIC VIOLENCE	STATEMENT TAKEN?
821 941 635			NO	NO

TYPE OF INCIDENT	UNIT RPTG.	DATE(S) & TIME(S) OF OCCURRENCE
BATTERY/POSS. OF FIREARM	3038A	08/26/82, 0010

DATE & TIME REPORTED TO POLICE

08/26/82, 0010

LOCATION OF OCCURRENCE	LOCATION SENT TO	TYPE OF PREMISE
439 Cole	SAME	PUBLIC STREET

REPORTING OFFICER/STAR	REPORT APPROVED BY/STAR	HOW CLEARED (RECORD ROOM USE ONLY)
GERATY, JOHN/807	Lt. H.B. JACKSON/687	6

VICTIM CODES: V-VICTIM; R-REPORTEE; W-WITNESS; P-PARENT; N-NOTIFY; F-FOUND; M-MISSING

171a

CODE/NAME (LAST, FIRST, MIDDLE)	RACE	SEX	DOB OR AGE	RES. PHONE
V/R CHRISTHENSEN, TROY E	W	M	6/28/58	359-5119

RESIDENCE ADDRESS

108 ESPENADA #194, PACIFICA, CA

OTHER INFORMATION/MISSING PERSON INFORMATION

MINOR CUTS & BRUISES TO FACE, 11185 RESPONDED, NO FURTHER MED. REQUIRED

CODE/NAME (LAST, FIRST, MIDDLE)	RACE	SEX	DOB OR AGE	RES. PHONE
R/W MARKLEY, DOUG	W	M	7/25/60	472-0217

RESIDENCE ADDRESS

100 MARIN CENTER DR. #9, SAN RAFAEL, CA

SUSPECT CODES: A-ADMONISHED; B-BOOKED; C-CITED; D-DETAINED; E-EXONERATED; S-SUSPECT; X-DIVERTED

CODE/NAME (LAST, FIRST, MIDDLE)	RACE	SEX	DOB OR AGE
B1 WEISSMAN, LARRY A	W	M	3/28/50

HEIGHT	WEIGHT	HAIR COLOR	EYE COLOR	ADDRESS
6-2	195	BRO	BRO	1889 OAK/439 COLE ST

BOOK/CITE SECTION

N/W 12031 PC, N/W 120256 PC, N/W 12021a PC, 242PC

WHERE BOOKED	BOOK/CITE APPROVED BY/STAR	I.D.# (SOC. SEC.:OP. LIC: ARMY SER.#: ETC
CO. F	SGT. WAITE/848	SS# 026 38 8937, SF#S294784

VEHICLE CODES: F-USED FELONY; U-USED OTHER; S-STOLEN; R-RECOVERED; B-BOOSTED; D-STRIPPED; T-TOWED; P-STOLEN PLATES; L-LOST

CODE	LICENSE PLACE	NO.	STATE	YEAR	TYPE	YEAR	MAKE	MODEL/STYLE	COLOR
V1	1EUM039		CA	80	P/C	80	TRYUMPH	3/DR TR7	BLK/RED

OTHER INFORMATION

FRESH DAMAGE TO RT REAR SIDE

173a

PROPERTY CONDITION CODES: S-STOLEN; R-RECOVERED; L-LOST; E-EVIDENCE; F-FOUND; P-PROPERTY FOR SAFEKEEPING; D-DAMAGE

CODE/PROPERTY DESCRIPTION

E1/ONE .38 CAL S&W SFC. MOD. 15-2 BLU STEEL FCN: #K612625 4678223804735

E2/FIVE(5) SPEER .38 CAL. ROUNDS (LIVE)

E3/ONE BRN LEATHER BRANCHI,HOLSTER

D1/DAMAGE TO (V1) (VEH) RT REAR SIDE VALUE: TBD

174a

BELOW INCLUDE ADDITIONAL HEADING, VICTIMS, SUSPECTS, VEHICLES AND/OR PROPERTY BEFORE BEGINNING NARRATIVE.

SUSPECT CODES CONT

B2 SIMMONOVSKI, MARIK (NMI) WM, 8/12/67, 6-2, 175 LBS. BLONDE HAIR

1889 OAK ST., 242 P.C. (C/A) NO ID.

C3 STEVENS, THOMAS, WILLIAM, WM, 9/21/44 BRN, BLU, 5-7, 120

1889 OAK, CITE# 010124984, 242PC

INCIDENT REPORT FORM CONTINUATION — SAN FRANCISCO POLICE DEPARTMENT

INCIDENT NO.	REPORTING OFFICER/STAR	DATE(S) AND TIME(S) OF OCCURRENCE
821 941 635	GERATY/847	8/26/82, 0010

C4 LANDBERG, RONALD, IAN, WM, 3/21/45, BLK,BLK

6-3, 250, 1889 OAK ST. CITE #010124923, 242 PC

C5 HUESTON, JEFFERY, PAUL, WM, 5/26/62, BLN, GRN

6-1, 200, 1889 OAK St., CITE# 011028091, 242 PC

NARRATIVE: (V/R) CHRISTENSEN TOLD OFFICER KELLY #494 AND ME THAT HE AND HIS FRIEND (RW/2) MARKLEY WERE WALKING DOWN THE WEST SIDE OF THE 400 BLK OF COLE SINGING A SONG ALOUD. (B1) THRU (C5) (WEISSMAN, SIMMONOVSKI, STEVENS, LANDBERG, HUESTON) WERE STANDING IN FRONT OF 439 COLE WHO TOLD (V/R) AND (R/W2) SHUT UP. (V/R) AND R/W2) (CHRISTENSEN AND MARKLEY) DID SO AND GOT INTO THEIR CAR (V1). AS THEY

175a

DROVE PAST (B1) THRU (C5) THEY HONKED THEIR CAR HORN AT THEM. (V/R) CHRISTENSEN STATED THAT ONE OF THE FIVE STANDING IN FRONT OF 439 COLE, THREW AN OBJECT AT HIS VEHICLE, HITTING IT ON THE RIGHT REAR SIDE (V/R) STOPPED HIS CAR TO INSPECT THE DAMAGE WHEN (B1) THRU (C5) AP-PROACHED HIM AND FIGHTING BEGAN. (W/R2) MARKLEY WENT FOR HELP AND OFFICER F. RADLEY #2511 (SF PATROL SPECIAL) RESPONDED. RADLEY TOLD ME THAT WHEN HE ARRIVED HE FOUND (B1) WEISSMAN ON TOP OF (V/R1) CHRISTENSEN. RADLEY BROKE UP THE FIGHT AND HELD (B1) THRU (C5) UNTIL R/OS ARRIVED. DURING MY CURSORY SEARCH OF (B1) WEISSMAN, I FOUND ITEMS E1 THRU E3 (LOADED REVOLVER) IN HIS FRONT WAIST BAND, (V/R1) SIGNED C.A. CARD FOR WEISSMAN SIMMINOVSKI, STEVENS, LANDBERG, HUESTON, SIMMONOVSKI, WAS BOOKED FOR LACK OF I.D. AND BATTERY ALONG WITH STEVENS, LANDBERG & HUESTON.

INCIDENT REPORT FORM CONTINUATION SAN FRANCISCO POLICE DEPARTMENT

INCIDENT NO.	REPORTING OFFICER/STAR	DATE(S) & TIME(S) OF OCCURRENCE
821 941 635	GERATY/847	8/26/82, 0010

THE LAST KNOWN REGISTRANT OF ITEM (E1) (HANDGUN) WAS IN 1973 TO A PERRY PHILLIPS OF 2037 HASTE ST. BERKELEY, CA. AS REPORTED BY AUTO STATUS.

CITES ATT. TO REPORT. ALL CITED TO APPEAR ON 9/16/82 ROOM 475 AT 0800 HRS

5G200 WW 161 04134

12015

12080

12100

177a

ACTION No.

DEFENDANT/S

THOMAS W. STEVENS and
JEFFERY P. HUESTON and
RONALD I. LANDBERG

CITATION

242 Penal Code, 236 PC
242 PC, 236 PC
242 PC, 236 PC

Dept.

THE PEOPLE OF THE STATE OF CALIFORNIA vs. THE DEFENDANT/S ABOVE NAMED

FILED

CLERK OF THE
MUNICIPAL COURT

By ..... Deputy Clerk

IN THE MUNICIPAL COURT

IN THE CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

COMPLAINT

BATTERY

RAYMOND J. ALLEN states and declares on information and belief that the said defendant S did in the City and County of San Francisco, State of California, on or about

the 14th day of August 19 82, commit the crime of Misdemeanor, to-wit: BATTERY, in that said defendant did then and there wilfully and unlawfully use force and violence upon the person of ELBERT WILTZ.

COUNT II:
That the said defendants did in the City and County of San Francisco, State of California, on or about the 14th day of August, 1982, commit the crime of misdemeanor, to wit: Violating Section 236 of the California, Penal Code, in that said defendant did wilfully and unlawfully violate the personal liberty of ELBERT WILTZ.

I state, declare, verify and certify under penalty of perjury that the foregoing is true and correct.

Executed in San Francisco, California on SEP 07 1982, 19

RAYMOND J. ALLEN

ACTION NO/S

DEFENDANT/S

LARRY A. WEISSMAN

VIOLATIONS

12025(b) PC (M)
12031 PC (M)
242 PC (M)
415(1) PC (M)

DEPT.

Dept 1 9/13

THE PEOPLE OF THE STATE OF CALIFORNIA vs. THE DEFENDANT/S ABOVE-NAMED

IN THE MUNICIPAL COURT
IN THE CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

COMPLAINT

EDWARD JOHNSTON states and declares on information and belief that the said defendant did in the City and County of San Francisco, State of California, on or about the 26th day of August, 1982, commit the crime of misdemeanor to wit: Violating Section 12025 (b) of the California Penal Code, in that said defendant did willfully and unlawfully carry concealed upon his person a .38 caliber SMITH & WESSON REVOLVER capable of being concealed upon the person without having a license to carry such firearm, he not then and there being a sheriff, constable, marshal, policeman, member of the Highway Patrol, and other duly appointed peace officer.

COUNT II

That the said defendant did in the City and County of San Francisco, State of California, on or about the 26th day of August, 1982, commit the misdemeanor, to wit: violating Section 12031 of the California Penal Code, in that said defendant did willfully and unlawfully carry a loaded firearm, to wit: a .38 caliber SMITH & WESSON REVOLVER on his person while in a public place and on a public street in an incorporated city, to wit, San Francisco, California.

COUNT III

That the said defendant did in the City and County of San Francisco, State of California, on or about the 26th day of August, 1982, commit the misdemeanor, to wit: BATTERY, in that said defendant did then and there willfully and unlawfully use force and violence upon the person of TROY E. CHRISHANSEN.

C11-C

COUNT IV

That the said defendant did in the City and County of San Francisco, State of California, on or about the 26th day of August, 1982, commit the misdemeanor, to wit: violating Section 415(1) of the California Penal Code, in that said defendant did willfully and unlawfully fight in a public place and challenge another person in a public place to fight.

I state, declare, verify and certify under penalty of perjury that the foregoing is true and correct.

Executed in San Francisco, California, on AUG 26 1982, 19___.

DWYER:lnm

EDWARD JOHNSTON

182a

ACTION No.	DEFENDANT/S	VIOLATION	Dept.
538642	THOMAS STEVENS	242 Penal Code	13/

THE PEOPLE OF THE STATE OF CALIFORNIA vs. THE DEFENDANT/S ABOVE NAMED

FILED

....

CLERK OF THE
MUNICIPAL COURT

By .....
Deputy Clerk

IN THE MUNICIPAL COURT

IN THE CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

COMPLAINT

BATTERY

183a

RAYMOND ALLEN

.....states and declares on information and belief that the said defendant.... did in the City and County of San Francisco, State of California, on or about

the 26th day of August 19 82 commit the crime of Misdemeanor, to-wit: BATTERY, in that said defendant did then and there wilfully and unlawfully use force and violence upon the person of TROY CHRISTHENSEN

184a

I state, declare, verify and certify under penalty of perjury that the foregoing is true and correct.

Executed in San Francisco, California on SEP 15 1982, 19

RAYMOND ALLEN

ACTION No.	DEFENDANT/S	VIOLATION	Dept.
538640	RONALD LANDBERG	242 Penal Code	15/127-128
538638	JEFFERY HUESTON	242 P.C.	

THE PEOPLE OF THE STATE OF CALIFORNIA vs. THE DEFENDANT/S ABOVE NAMED

IN THE MUNICIPAL COURT

IN THE CITY AND COUNTY OF SAN FRANCISCO
STATE OF CALIFORNIA

COMPLAINT

BATTERY

FILED

CLERK OF THE
MUNICIPAL COURT

By ..... Deputy Clerk

185a

RAYMOND ALLEN states and declares on information and belief that the said defendant[s] did in the City and County of San Francisco, State of California, on or about

the 26th day of August 19 82, commit the crime of Misdemeanor, to-wit: BATTERY, in that said defendants did then and there wilfully and unlawfully use force and violence upon the person of TROY G. CHRISTHENSEN

9/23 M15 9:00 AM

1586

I state, declare, verify and certify under penalty of perjury that the foregoing is true and correct.

Executed in San Francisco, California on September 16, 19 82

RAYMOND ALLEN

MUNICIPAL COURT OF THE CITY AND COUNTY OF SAN FRANCISCO

STATE OF CALIFORNIA

COPY

---o8o---

THE HON. INA LEVIN GYEMANT, JUDGE

- -

THE PEOPLE OF THE STATE OF CALIFORNIA, PLAINTIFF, -vs-	DEPARTMENT NO 17
THOMAS WILLIAM STEVENS,	Court No. 536093 O 811478/A 242, 236 PC
RONALD IAN LANDBERG,	Court No. 538642 O 8124984 242 PC Court No. 538640 O 8124973 242 PC
LARRY A. WEISSMAN,	Court No. 536095 O 111592/A 242, 236 PC Court No. 538321 K 69354-7A, 12831, 12025 242, 415.1 PC
JEFFREY PAUL HUESTON, DEFENDANTS.	Court No. 536094 O 111581/A 242, 236 PC

- -

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARINGS

JANUARY 11, 25, 1983
FEBRUARY 23, 1983
MAY 3, 5, 1983

---000---

APPEARANCES:

For the People	THE HON. ARLO SMITH District Attorney By: MR. LAWRENCE MURRAY MR. WILLIAM HICKEY MR. ALAN R. LIPTON Assistant District Attorneys
For the Defendants	IN PROPRIA PERSONA
Reported by:	Jerry M. Matsukado, CSR # 5251 Official Court Reporter

INDEX TO DATES

11 January, 1983	1
25 January, 1983	82
23 February, 1983	163
3 May, 1983	181
5 May, 1983	205

INDEX TO WITNESSES

For the Defense:	Dir.	Cr.	Redir.	Recr.
JOHN CLAYTON GERATY				
By Mr. Weissman	95		112	
By Mr. Murray		97		

INDEX TO EXHIBITS

For the People		I.D.	Evid.
1	Conduit	98	125
2	Evidence Envelope	98	125
2A	.38 Smith & Wesson	110	125
2B	Holster	110	125
2C	Envelope	110	125
2D	.38 Cal. Bullets	110	125

For the Defense
For the Motion to Suppress

A	Citizens arrest card	128	128

For the Murghia Motion

A	Affidavits	149
B	Motion to Suppress	149
C	Complaint	149
D	Complaint	149
E	Disposition Record	149
F	Memorandum	149
G	Petition	150
H	Transcript	150
I	Examiner article copy	150
J	Examiner article copy	150

corner of Cole and Haight, on the 1700-block of Haight.

Q. In front of the I-Beam? A. No. Down the street from it.

Q. And you were in your patrol car? A. Yes, I was.

Q. And how long had you been at that corner? A. We were just passing by.

Q. And the --- A. He flagged us down.

Q. He flagged you down? A. Correct.

Q. He stepped in the street and waved? A. From the sidewalk he waved.

Q. And you pulled over? A. That's correct.

Q. It's your testimony that you took me and the other defendants into custody pursuant to a citizens arrest by Mr. Christianson (phonetic)?

A. That's correct.

Q. And you did not see any crime committed in your presence?

A. That is also correct.

Q. So, you were--- A. Other than possession of what I found later.

Q. You were simply aiding Mr. Christianson (phonetic) in making a citizens arrest? A. That's correct.

Q. And it was you, personally, who asked Christianson to fill out the citizens arrest card?

A. I told him what had to be done; and he agreed to it.

Q. Did you -- you testified that when you arrived at the scene, that a patrol special officer had a number of people -- I believe you said five people -- against the car, and he had his gun out?

A. That's correct.

Q. Where was Mr. Christianson (phonetic) at that time?

A. I believe he was standing behind the officer -- the patrol special. I cannot be certain, but I believe that's---

Q. Did you ask anything else--

Let me ask you this: First, did you happen to notice if one of the defendants was standing there didn't have any shirt on and did not have any shoes on?

MR. MURRAY: Your Honor, I'm going to have to object. I don't know what relevancy that has to a motion. Maybe trial.

THE COURT: What would the relevancy be?

MR. WEISSMAN: The relevance would be the care with which the officer was observing what he saw on the scene -- if he picked up all the details of what was happening.

THE COURT: I'm going to sustain the objection.

MR. WEISSMAN: Q. Did you ask anyone other than Christianson and patrol officer Bradley (phonetic) for statements as to what happened?

A. Now, who are the choices? I have the patrol special and who else -- Bradley?

Q. The patrol special's name is Officer Radley (phonetic).

And Mr. Christianson (phonetic) -- you already testified that you talked to him.

Did you talk to any of the defendants as to what happened? A. None of the defendants. They were right as they placed their hands on the wall.

Q. Did you ask any of them what happened? A. No, I

Q. Did you know or believe that any of us were members of the White Panter Party?

MR. MURRAY: Your Honor, at this time I'd object as to relevancy and motion to suppress.

Defendant seems to want to start the Murghia hearing at this point, as opposed to continuing along the line of whether or not this was a proper seizure by this officer.

THE COURT: What would the relevancy be?

MR. WEISSMAN: I believe these questions would go to the officer's bias which would influence his tendency to give false testimony at this hearing.

THE COURT: For the purpose of this hearing, I'm going to sustain the objection.

MR. STEVENS: Q. Had you not known Mr. Christianson

(phonetic) previous to that night? A. No.

Q. You had never seen him before? A. That's correct.

Q: At the time that you made the search of myself, I was already under arrest; isn't that correct?

A. You were being detained while I could figure out what was happening.

Q. At the time that the search was made -- your testimony -- was I in handcuffs? A. You were in handcuffs. You were under arrest.

Q. When was the search made? A. I searched you after I had handcuffed you.

Q. So, it's your testimony that I was under arrest at the time that you searched me. A. At the time I found

your gun, you were under arrest.

A VOICE: Your Honor, we would have to notice you that there is a potential witness in court.

I guess he just left.

Okay. Sorry about that, Your Honor.

MR. WEISSMAN: Q. Just to go back there -- so, your answer was -- to the question -- at the time that you found the weapon, I was under arrest, was "yes" (sic)?

A. That's correct.

Q. And that was an arrest pursuant -- that was a citizen's arrest, in your understanding? A. That's correct.

Q. By Mr. Christianson (phonetic)? A. By Mr. Christianson (phonetic).

A VOICE: Your Honor, excuse me.

One of the witnesses -- he said one of the witnesses were going to be in court and the gentleman in the rear, there, raised his hand.

I was wondering if that was the witness.

THE COURT: Is there anyone---

MR. WEISSMAN: No. That was --

MR. STEVENS: That was the person that was pointing out the witness.

A VOICE: Raised his hands.

MR. STEVENS: One of the district attorney's witnesses came in, sat down for a minute.

It was a matter of concern as I stood up to mention it. He left.

No problem at this point.

MR. STEVENS: Well, the factual basis is---

THE COURT: I have before me at this time your moving papers with a couple of affidavits; and one allegation of a prior incident where there was an arrest; and a case that went to Preliminary Hearing, that was dismissed at Preliminary Hearing.

MR. STEVENS: Right. We, at this time, Your Honor ---

THE COURT: Do you want to add something to that?

MR. STEVENS: We've been, over the last few months, insofar as we have been preparing affidavits for a lawsuit in federal court which happened to speak to the same points -- they will have a hearing U.S. District Court -- but we would

ask the Court to accept them as part of our record, here; and we'll give copies to the district attorney and to the court at this point.

MR. MURRAY: Your Honor, I'm going to object vehementaly at this. They've had every opportunity to present these prior to today. They knew that the district attorney was going to take ---

Before those are filed or accepted, I'd like to be heard.

THE COURT: All right.

MR. MURRAY: They knew that the district attorney was taking a very active role in this Murghia Motion. We've prepared extensive paperwork. We gave them copies of paperwork -- this, this, our pleading or affidavits -- all of that -- as

much as two weeks or a week ago.

When we were in here last, they had every opportunity at that time to say, "We are going to base our motion upon the moving papers that you have, Mr. Murray. And here's something else -- here's declarations under penalty of perjury upon which we are going to proceed."

Today's the date for the hearing; and, at the eleventh hour comes the paperwork in -- on which they intend to rely. I don't believe that's appropriate.

I don't believe that we should go on what they have here, as opposed to what I have spent hours and hours and hours -- preparing affidavits and responses, researching the case law that they present, preparing my own papers -- to find out at the eleventh hour that was right, but this is what they intend

to rely on.

THE COURT: Why weren't these affidavits submitted heretofore?

MR. STEVENS: There is a two-day rule; and the Court would have to find there's good cause for this, but, Your Honor, the facts of the matter is that we are involved almost full time in a bitter political campaign.

I believe the purpose of these charges is to distract from the campaign. And we've just been suppressed -- two things we can't do -- everything has -- has been suppressed from the press.

We're a small organization. We rushed this together after the Court denied the discovery in Murghia at the last hearing; and we couldn't meet a faster schedule than this. It

was impossible.

THE COURT: Can I see the affidavits?

MR. STEVENS: There will also be four more documents that we will submit in order, if the Court takes any exhibits; and they are one- or two-page documents, some of which have already been referred to already.

There s no question, I suppose, that the district attorney is entitled to a continuance; and that may be the fairest way to remedy the fact that we are producing them today for the first time.

THE COURT: Do you have anything else in addition to these affidavits?

MR. HUESTON: Yes, Your Honor. About four other documents.

THE COURT: What are those?

MR. STEVENS: Okay.

First in order is a memo from Captain Eimil (phonetic) documenting the attempted, at least, influence by the Mayor's Office on the district attorney and the courts; and I call the Court's special attention to paragraph three, signed by Eimil, to the Chief of Police, so it has some authority in the City.

The district attorney -- the district attorney and judges do not respond well to pleas from public officials and police for greater action and stiffer sentences on many misdemeanor cases. However, they are very sensitive to demands from community organizations requesting greater prosecution and stiffer penalties.

A request by the police department to each of these groups to write or meet with the district attorney and the Municipal Court judges should produce the desired results.

Now, I don't know whether you've been visited, and I don't know whether it's produced the desired results. But I do know that we also have copies of a petition from a few people in the neighborhood who were organized -- I might add -- by the government who petitioned the district attorney as is called for here, for greater prosecution of the White Panther Party.

At-that-time-District-Attorney Freitas indicated that he certainly was going to increase prosecution of the White Panther Party; and he said so to a T.V. station. So --

And a prosecution resulted. And we're about to submit that, Your Honor.

We were never given -- we were never given the people that signed this. It was stated it was signed by twenty-six people. We have a tape of the T.V. show when District Attorney Freitas was on the witness stand, under oath. He verified the number of signatures, but we never got the signatures because of a theory that the District Attorney's Office expressed, that if we knew the name of anybody that criticized us, we might attack them violently.

And we have a transcript of that T.V. show, Your Honor, if you'd like to see that.

If I talk am I restricting you from reading?

THE COURT: Why don't you wait just one second.

Okay.

MR. STEVENS: Your Honor, there's just couple more

documents.

One of the theories we advanced in our moving papers is that the district attorney's office isn't against crime. In fact, is glad to make an alliance with criminals. It's against people who don't cooperate with the D.A. So, honest citizens who don't cooperate with the D.A., such as ourselves, are perceived as enemies that they can prosecute.

Criminals who cooperate with them are perceived as friends that they should help.

We quoted the inspector -- Inspector Kearns (phonetic), literally bragging about that policy in the Examiner; and that quote is in the moving papers. But we have that article from the Examiner here.

That quote, you may recall, is the inspector saying

that the community is replete with criminals who are feeding information to the District Attorney's Office, and in exchange for that, get favorable treatment when they're caught committing crimes. It assumes something else -- they're not caught committing crimes against the right people, but they're still getting that favorable treatment.

Consequently, we think that one of the main reasons for the animus toward the White Panther Party is our policy of not cooperating with the district attorney in this descent into fascism which I believe is taking place.

If the government at this point in history is using criminals to attack political activists, then that falls under most definitions of fascism.

Okay. I think we're dealing with phenomena that

serious ---

THE COURT: Now, you have in your hand what?

MR. STEVENS: I'm going to submit the article in which the D.A.'s office and police Inspector Kearns (phonetic) bragged about this policy which they regard as a very effective way to -- I don't know what -- to get what they want.

And the final ---

THE COURT: Okay.

You said "finally" ---

MR. STEVENS: Yes, Your Honor.

We have evidence of the prior prosecutions.

But the other document is an article that I wrote for the Examiner where I criticized the tendency to rely on criminals who give false or true information in order to beat a

rap as the basis for guiding law enforcement.

I think, on reflection, sooner or later something, somebody is going to realize the fact that I'm right about this; and that the District Attorney's Office has a very reckless policy that's only discrediting law enforcement and making it possible for it to take place.

That's the article.

THE COURT: Okay.

MR. STEVENS: That completes those documents, Your Honor.

THE COURT: All right.

And you said that there were notice -- affidavits that you wanted to submit?

MR. STEVENS: Yes, Your Honor.

But, actually, these affidavits are cumulative; so,

unless the District Attorney's Office should produce evidence that denies a fact that we have attested to, we can stand at the moment.

THE COURT: Well, I think the whole idea of the Murphia Motion is to establish a pattern; so, unless these are representative of something that's already in here, why don't you submit it.

MR. STEVENS: Okay.

What we should probably then submit is just -- it's on the record, but in fact, just to prove that these prosecutions have been -- have take.. place year after year after year, over and over again, so we're spending our whole lives on trial, we submit the complaints and in our prior prosecutions.

Right. And going back a few years, we -- the remaining documentation verifies prosecution.

THE COURT: Why don't you submit these with your affidavit?

MR. STEVENS: Well, because it's conceivable that the Court may not take every affidavit that we submit as the absolute truth; so we're trying to show documentation beyond our affidavits.

THE COURT: What I'm saying is why don't you submit this information with your moving papers?

MR. STEVENS: Oh. Your Honor, we had hoped to conduct this Murghia Motion in a totally different way. We actually had hoped for some discovery at the last motion; and, then, we were going to proceed along a somewhat different line.

When the discovery was denied, we had to restrategize the thing. And then we had to basically, you know -- we have to go through a lot of old court files, both in this building, that we had, and do an awful lot of work. That it's right that we did; but it took time.

We have a tendency to think that these things are common knowledge; but, of course, that's erroneous on our part. They may not be.

THE COURT: This paper that has Lee Stimmel's (phonetic) name on it: There seems to be a part -- there seems to be a second page that's missing.

MR. STEVENS: What is the document called?

THE COURT: Notice of motion to suppress evidence.

There's no date on it.

MR. MURRAY: Mine has a date of 1974 -- file-stamped.

MR. STEVENS: Point of it was the document that a hearing was held at that time, and the process was continuing. That case went to jury trial.

THE COURT: And the defendants, you're saying, are members of the White Panther Party?

MR. STEVENS: Yes.

And they were acquitted. Except for one case, we have always prevailed, and eventually were vindicated -- our innocence been shown.

So, our complaint isn't that we have to go on trial -- civil rights activists -- we don't mind standing trial, bringing these things before a jury. But the time consumed is repressive.

THE COURT: All right.

Is Terrel Cox (phonetic) also a member of the White Panther Party?

MR. STEVENS: Yes, Your Honor.

As a matter of fact, he was in court this morning.

THE COURT: Why don't we --

I'm going to ask the clerk to mark these so we'll know what we're referring to.

Can you mark these as exhibits?

You want to bring yours over to be conformed?

Affidavits are "A".

(Whereupon, affidavits, marked Defense Exhibit A for Identification)

MR. MURRAY: Motion to suppress in People v. Jones and

Speed, filed 1974, is "B".

(Whereupon, motion to suppress, marked Defense Exhibit B for Identification)

MR. MURRAY: Municipal Court complaint ---

MR. STEVENS: The reason for the half-document---

MR. MURRAY: -- charging Larry Weissman with 245A on December 1, 1980 is C.

(Whereupon, Complaint, marked as Defense Exhibit B for Identification)

MR. MURRAY: D is a complaint charging Larry Weissman with one count of 148 and on August 20th, 1978.

(Whereupon, 1978 Complaint, marked Defense Exhibit D for Identification)

MR MURRAY: E appears to be a photocopy of the Municipal

Court record -- disposition record for 1974, month of August and September with the name Weissman on it.

(Whereupon, 1974 disposition record, marked Defense Exhibit E for Identification)

MR. MURRAY: F is an intradepartmental memorandum from George Eimil (phonetic) to Cornelius P. Murphy, Chief of Police.

That's F, dated 7-22=81.

(Whereupon, memorandum, marked Defense Exhibit F for Identification)

MR. MURRAY: G is a petition presented to the district attorney's office -- purportedly presented to the District Attorney's Office on 8-23-78, regarding, I guess, the removal of the Panthers.

(Whereupon, petition, marked Defense Exhibit G for Identification)

MR. STEVENS: The transcript, T.V. show, will establish that it was actually delivered and accepted by the D.A.'s office.

MR. MURRAY: Transcript of -- H, transcript of KTVU, channel two news broadcast of August 23rd, 1978.

(Whereupon, transcript 8-23-78, marked Defense Exhibit H for Identification)

MR. MURRAY: I, two-page reproduction of the San Francisco Examiner on March 25, 1981, pages one and A-4.

(Whereupon, Copy of Examiner, 3-25-81, marked Defense Exhibit I for Identification)

MR. MURRAY: J is page 37 of the San Francisco Examiner

of Thursday, April 26th, 1979, an article by Thomas Stevens.

(Whereupon, Article 4-26-81, marked as Defense Exhibit J for Identification)

And, if I might, may I look at the Court's document filed by the defendants as Defense A. Can I look at that for a second?

THE COURT: All right.

Obviously, neither I nor the district attorney have had a chance to review the materials that you've just submitted.

Let me see if I can just review a little bit of this with you.

You're submitting a complaint -- now, I'm addressing myself to prior accusations -- prosecutions, I should say,

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO

APPELLATE DIVISION

---o0o---

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Appellant,

vs.

THOMAS W. STEVENS, LARRY WEISSMAN, JEFF HUESTON, RONALD LANDBERG,

Defendants and Respondents

FILED
MUNICIPAL COURT
FEB 1 2 4U PM '84
BY
CLERK
DEPUTY

REPORTER'S TRANSCRIPT

On Appeal from the Judgment of the Municipal Court of the
State of California
In and For the City and County of San Francisco

HONORABLE JOSEPH A. DESMOND

---oOo---

HON. ARLO E. SMITH
District Attorney
City and County of San Francisco
880 Bryant Street
San Francisco, CA 94103
Telephone: 553-1752

Defendants appeared in
Propria Persona

VOLUME I
Pages A-1 thru A-34
thru 264

at the hospital.

Q. Which hospital?

A. UC.

Q. And is your wife Realla (phonetic spelling) Wiltz?

A. That is correct. We are separated.

Q. Separated? Okay.

Now do you recall on a prior occasion assaulting Realla Wiltz with a handgun?

MR. LIPTON: Objection.

MR. STEVENS: I will make an offer of proof, your Honor.

THE COURT: I'm going to --

MR. LIPTON: May we approach the sidebar?

THE COURT: Yes, please do.

(Colloquy between Court and counsel at the bench out of the hearing of the court reporter.)

THE COURT: The objection is overruled.

(To the witness) Mr. Wiltz, do you remember the question now?

THE WITNESS: No, could I have the question repeated, your Honor?

THE COURT: Mr. Stevens, do you want to repeat it or have it read back?

MR. STEVENS: Q. Did you, if you recall, ever assault Realla Wiltz with a handgun?

A. Never.

Q. Where is Realla Wiltz presently?

A. I would assume she is at home.

Q. What is her address?

THE WITNESS: Your Honor, could I --

MR. STEVENS: The obvious reason is that I want to subpoena her.

THE WITNESS: Could I confer? Your Honor, I fear for my safety. I do fear for my ex-wife's safety.

THE COURT: All right.

MR. LIPTON: Your Honor, the People will endeavor to subpoena Realla Wiltz.

MR. STEVENS: That is not accepted.

Your Honor, we have been through this once before.

We would like to -- certainly, Realla Wiltz couldn't conceivably be in any danger, and we would like to subpoena her.

THE COURT: All right, if you have any problems

subpoeanaing her, then bring that up to the Court's attention.

The objection is sustained.

MR. STEVENS: Well, the problem is that we don't know her address. This witness knows her address, this witness knows her address, and that is what we are trying to get, your Honor.

THE COURT: We will discuss that matter in private at the break.

MR. STEVENS: Okay.

Q. You testified you spoke to this young woman and quickly moved on up the street?

A. Right.

Q. Didn't hear anyone yell at you or anything like that?

A. No, no.

Q. You moved on up the street, and as I understand your

A. Yes.

Q. What defendant?

A. We first -- I first approached Mr. Landberg and Mr. Hueston, asked them why they were holding the man down.

Q. What response did you receive, if any?

A. No response.

Mr. Stevens stated he would answer any questions I would have had.

Q. How did he say: I will answer any question that you may have? What did he say? Do you remember his words?

A. I really don't recall the exact conversation -- context of the conversation.

He stated that the two men were holding the other man down as a result of the two -- that the man who was down and his

brother were bothering an unidentified woman in the Panhandle.

Q. In the Panhandle?

When you asked Mr. Hueston and Mr. Landberg why they were holding a man down, before Mr. Stevens interjected, did Mr. Hueston and Mr. Landberg make a reply to you?

A. I believe that they did. I really don't recall the exact words or -- other than the fact they did indicate that Mr. Stevens was the spokesman.

Q. Did you ever ask the defendants, specifically Mr. Landberg and Mr. Hueston, to let the black man up?

A. Yes.

Q. And was there a reply?

A. There was a look of confusion on both their faces, looking at me and Mr. Stevens.

Q. Then did they let them (sic) -- him, after you asked to let him go?

A. After a few minutes they let him up, but that was after Mr. Stevens' direction.

Q. How many times did you have to ask Mr. Landberg and Hueston to let the black man up?

A. Two to three times.

Q. That was over the course of a few minutes?

A. Three minutes.

Q. And during that period of time, did Mr. Hueston -- I mean, did Mr. Stevens appear to control Mr. Hueston and Mr. Landberg with respect to the black person?

A. They were -- "control," can you rephrase -- re-ask the question?

Q. How did Mr. Stevens appear to interact with Mr. Hueston and Mr. Landberg during that period of time -- of time when you first asked them to release the black man from the ground, until they finally did?

A. Any questions I did -- I asked -- asked of Mr. Landberg and Mr. Hueston, Mr. Stevens did interject and stated that the reason why the two men were holding the third man down was because of the fact this man and his brother had bothered this woman in the park.

Q. Did you ask him -- them why they weren't holding down the brother?

A. No, I didn't.

Q. Did you see the brother anywhere?

A. He was in the area. Now, the exact location, I don't

Q. During that period of time, you did not struggle; is that right?

A. No, I asked the police officers to remove them. I was being assaulted; I needed help. That is when they took action.

Q. What kind of action did they take?

A. They told them to get off me.

Q. Do you recall if the first time the police officers told them to get off you, if they got off you?

A. Yes, they did.

Q. Was it the first time?

A. I believe --

MR. STEVENS: Leading. Asked and answered, and the second question is -- leads to an answer that the District Attorney wants.

THE COURT: Overruled.

Next question.

MR. STEVENS: All right.

MR. LIPTON: Q. Have you had an opportunity to review videotapes of this incident?

A. No, I haven't.

Q. Have you had an opportunity to listen to any tape recordings that occurred, that were made during the time of this particular incident?

A. No, I haven't.

Q. Have you had the opportunity to review any documents or anything to help you refresh your recollection to testify here today?

A. No.

ARLO SMITH
District Attorney
660 Bryant Street
San Francisco, California

Telephone: 553-1752

2322a

MUNICIPAL COURT OF THE CITY AND COUNTY OF

SAN FRANCISCO, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	NO. 538321, 538343
	)	538636, 538640,
Plaintiff,	)	538642
	)	
	)	
vs.	)	
	)	
THOMAS W. STEVENS, LARRY HEISSMAN,	)	
JEFF HOLSTON, MARIK SIMONOUSKI,	)	
AND RONALD LANDBERG,	)	
	)	
Defendants.	)	
	)	

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. THOMAS W. STEVENS, JEFF HUESTON, AND RONALD LANDBERG, Defendants.	NO. 536093, 536094, 536095 DECLARATION OF ARLO SMITH

I, Arlo Smith declare:

1. I am an attorney licensed to practice law in the State of California and as such I am the San Francisco District Attorney.

2. I have previously been served a subpoena by defendants and their agents to appear in the Murgia hearing, previously scheduled for January 6, 1983, in Department 17 of the above-entitled court to give testimony.

3. I was not present during either of the attacks during the months of August 1982 by the defendants and I know of no other members of the District Attorney's Office who was presenting during the attacks.

4. I have not communicated with or discussed any aspect of the White Panthers or its members or these particular charges with anyone in the District Attorney's Office prior to being subpoenaed. I was unaware of the existence of the charges in these cases until called to my attention by the White Panthers themselves after the prosecution itself had begun.

5. I have not discussed the existence of the White Panthers or their members or these cases with the Mayor or any member of her staff, nor with the Board of Supervisors or any

individual member or members nor with any of the members of their staff nor with any other government employees or officials prior to being subpoenaed in this case, nor am I aware of any members of the District Attorney's office who has done so.

6. As the District Attorney I participate in thousands of prosecutions of assault related and deadly weapon type charges each year. From the information contained in the police report, this would appear to be a typical assault situation where we would file a criminal complaint. Nothing therein seems out of order or negating the necessity of criminal charges.

7. I have not nor am I aware of any member of my staff who is prosecuting the White Panthers or any other

organization or any member of an organization in order to remove them from any particular area, neighborhood or location in San Francisco or elsewhere. Further I have not, nor do I know of any member of my staff who has, discussed the removal of or intimation of any organization, including the White Panthers, or members thereof, for the purpose of removal from any area, neighborhood, or location in San Francisco or elsewhere.

8. I have never instructed or permitted any member of my staff or ever heard of any members filing charges against the White Panthers or their members or associates or anyone else for the purpose of retaliation, intimidation, harrassment, fear, vexation, annoyance, hatred, ill will or anger. It is the policy of my administration to file charges where the facts

of the incident warrant criminal prosecution and for no other reason.

I declare under penalty of perjury the foregoing is true and correct. Executed at San Francisco, California on January 4, 1983.

ARLO SMITH
District Attorney

ARLO SMITH
District Attorney
880 Bryant Street
San Francisco, California

Telephone: 553-1752

MUNICIPAL COURT OF THE CITY AND COUNTY OF

SAN FRANCISCO, STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. THOMAS W. STEVENS, LARRY WEISSMAN, JEFF HUESTON, MARIK SIMMONOUSKI, AND RONALD LANDBERG, Defendants.	NO. 538321, 538343 538636, 538640, 538642

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. THOMAS W. STEVENS, JEFF HUESTON, AND RONALD LANDBERG, Defendants.	NO. 536093, 536094, 536095 DECLARATION OF GERALD R. KOELLING

I, Gerald R. Koelling declare:

1. I am an attorney licensed to practice law in the State of California and as such I am a member of the San Francisco District Attorney's staff as a supervisor of Trial Attorneys. I was the supervisor of the Municipal Court Attorneys who caused to file the charges contained in the above cases.

2. I have never allowed or heard of any member of the misdemeanor trial department file charges for any reason other than they are warranted by the facts of the case.

3. I was not present during either of the attacks during the months of August 1982 by the defendants and I know of no other members of the District Attorney's Office who was presenting during the attacks.

4. I have not communicated with or discussed any aspect of the White Panthers or its members or these particular charges with anyone in the District Attorney's Office prior to being subpoenaed. I was unaware of the existence of the charges in these cases until called to my attention by the White Panthers themselves after the prosecution itself had begun.

5. I have not discussed the existence of the White Panthers or their members or these cases with the Mayor or any member of her staff, nor with the Board of Supervisors or any individual member or members nor with any of the members of their staff nor with any other government employees or officials prior to being subpoenaed in this case, nor am I aware of any members of the District Attorney's office who has done so.

6. As the Assistant District Attorney I participate in thousands of prosecutions of assault related and deadly weapon type charges each year. From the information contained in the police report, this would appear to be a typical assault situation where we would file a criminal complaint. Nothing therein seems out of order or negating the necessity of

criminal charges.

7. I have not nor am I aware of any member of my staff who is prosecuting the White Panthers or any other organization or any member of an organization in order to remove them from any particular area, neighborhood or location in San Francisco or elsewhere. Further I have not, nor do I know of any member of my staff who has, discussed the removal of or intimation of any organization, including the White Panthers, or members thereof, for the purpose of removal from any area, neighborhood, or location in San Francisco or elsewhere.

8. I have never instructed or permitted any member of my staff or ever heard of any members filing charges against the White Panthers or their members or associates or anyone

else for the purpose of retaliation, intimidation, harrassment, fear, vexation, annoyance, hatred, ill will or anger. It is the policy of this administration to file charges where the facts of the incident warrant criminal prosecution and for no other reason.

I declare under penalty of perjury the foregoing is true and correct. Executed at San Francisco, California on January 4, 1963.

GERALD R. KOLLING
Assistant District Attorney

EXPLANATION OF ABBREVIATIONS USED IN CITING REPORTER'S TRANSCRIPTS

Transcripts were prepared by several court reporters. Therefore, there is not one transcript consecutively numbered, but six separately numbered transcripts. Each of the six is identified by a letter for the sake of brevity.

Following are the reporters' transcripts, the dates and events reported, and the abbreviations used.*/ (All occurred in 1983).

A January 11 - Motion for Additional Discovery

January 25 - Motion to Suppress Evidence

January 25, February 23 - Motion to Dismiss/Discriminatory Prosecution

May 3,5 - Motion to Hold District Attorney in Contempt

* These are the same abbreviations used throughout the appeal by all parties in the California court.

AA January 25 - Ruling on Motion to Suppress

B June 6 - Motions in Limine; Motion to Exclude Testimony

June 30 - Closing Arguments at Trial

C June 15 - Motion to Quash Subpoena Duces-Tecum

D June 1 - July 29 - Trial; Motion in Arrest of Judgment; Motion for New Trial Sentencing (5 volumes, 1320 pages)

E June 28 - Trial (one day)